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SUPREME COURT, U.S.

# 80-6743

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER and JAMES RUTLEDGE,

Appellants,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS; PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

On Appeal from the Supreme Court of Florida

## JURISDICTIONAL STATEMENT--STATE CIVIL CASE

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COUNSEL FOR APPELLANTS

## PRELIMINARY MATTER

## QUESTIONS PRESENTED

Does §944.485, Florida Statutes (1978), violate the right to privacy of Florida prisoners by requiring them to fully disclose all of their assets and income as a condition of parole eligibility.

Does §944.485, Florida Statutes (1978), violate the ex post facto prohibitions of the Federal Constitution by imposing upon all Florida prisoners the obligation of paying a pro rata share of the cost of maintaining the Florida prison system, including those inmates who had committed offenses and were incarcerated prior to the effective date of the Florida Statute.

Does §944.485, Florida Statutes (1978), deprive Florida prisoners of due process of law by assessing each Florida prisoner a pro rata share of the cost of maintaining the Florida prison system without providing any Fourteenth Amendment due process safeguards in the determination of how much each prisoner will pay.

Does §944.485, Florida Statutes (1978), deprive Florida prisoners of due process of law by failing to provide them any Fourteenth Amendment procedural due process safeguards in the determination of whether they have sufficient funds or income available for the payment of their pro rata assessment of the cost of maintaining Florida's prison system.

Whether §944.485, Florida Statutes (1978), violates the substantive due process rights of Florida prisoners by imposing upon them the cost of their own involuntary servitude, and by being otherwise arbitrary, capricious, and rationally unrelated to any legitimate state purpose.*

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*The parties to the proceeding in the Supreme Court of Florida were Eddie Samuel Ivory, Charles Johnson, Edmond Duhart, Ben Chaney, Blair Smith, George Heller, Robert J. Butler and James Rutledge, Appellants herein,and Louie L. Wainwright, Secretary, Department of Corrections; and Paul Murchek, Director, Florida Parole and Probation Commission, Appellees herein.

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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1980

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EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER and JAMES RUTLEDGE,

Appellants,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS; PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

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On Appeal from the Supreme Court of Florida

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JURISDICTIONAL STATEMENT--STATE CIVIL CASE

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OPINIONS BELOW

The Opinion of the Florida Supreme Court entered October 30, 1980, Motion for Rehearing overruled February 20, 1981, and the Opinion of the Circuit Court of Leon County, Florida are set out in the Appendix hereto. The decision of the Florida Supreme Court is reported as Ivory v. Wainwright, 393 So.2d 542 (Fla. 1981).

## JURISDICTION

This action for injunctive and declaratory relief draws into question the constitutional validity of §944.485, Florida Statutes (1978), upon the ground that the statute violates the right to privacy of Florida prisoners, that it is an ex post facto law, and that it denies Florida prisoners substantive and procedural due process of law. The statute requires all prisoners to disclose all of their assets and revenues as a condition of parole eligibility. The statute also requires prisoners to pay from such income and assets all or a fair portion of the prisoner's daily subsistence costs, based upon the prisoner's ability to pay, the liability or potential liability of the prisoner to the victim or the guardian of the estate of the victim, and the needs of the inmates dependents. Although the statute provides that prisoners shall be entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposition to the assessment, reasonable procedural safeguards are not provided by statute or by implementing rule, and judicial review of assessments is unavailable.

The federal constitutional questions were initially raised by the Appellants in a pro se complaint seeking injunctive and declaratory relief from a Florida trial court. On appeal to the Florida Supreme Court, appointed counsel raised and briefed the federal constitutional questions. On June 18, 1979, the Leon County Circuit Court ruled that the statute did not violate the Appellants' rights against self-incrimination, did not deprive them of property without due process of law,

did not deny them of equal protection of the law, or abridge any of their privileges or immunities, and that the statute did not violate "any other constitutional right." On October 30, 1980, the Supreme Court of Florida affirmed the trial court's judgment, expressly holding the statute non-violative of rights to privacy, not in violation of the prohibition against ex post facto laws, and that the statute did not deny Appellants liberty or property without procedural due process. With one justice dissenting, the majority of the Florida Supreme Court upheld the statute as against the constitutional challenge. The dissenting opinion of Justice Boyd states his view that the statute is an ex post facto law, and also that it violates prisoners' Fourteenth Amendment due process rights.

A timely Motion for Rehearing was filed by the Appellants on November 12, 1980, and was overruled by the Supreme Court on February 20, 1981. Notice of Appeal to this Court was timely filed on May 20, 1981.

The jurisdiction of the United States Supreme Court to review this decision of the Supreme Court of Florida on appeal is conferred by 28 U.S.C. §1257(2). Stanton v. Stanton, 421 U.S. 7 (1975); Duren v. Missouri, 99 S.Ct. 664 (1979); Orr v. Orr, 99 S.Ct. 1102 (1979).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, §10, Clause 1 of the Constitution of the United States provides:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin as tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Ninth Amendment to the United States Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The Fourteenth Amendment to the United States Constitution, §1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 944.485, Florida Statutes (1978), provides:

> (1) In recognition of the fact that many prisoners in the correctional system have sources of income and assets outside of the correctional system, which may include bank accounts, inheritances, real estate, social security payments, veteran's payments, and other types of financial resources, and in recognition of the fact that the daily subsistence cost of incarcerating prisoners in the correctional system is a great burden on the taxpayers of the state, each prisoner in the state correctional system, except those who have entered into an agreement under s.947.135, prior to October 1, 1978:
>
> (a) Shall disclose all revenue or assets as a condition of parole eligibility.
>
> (b) Shall pay from such income and assets, except where such income is exempt by state

> or federal law, all or a fair portion of the prisoner's daily subsistence costs, based upon the inmate's ability to pay, the liability or potential liability of the inmate to the victim or the guardian or the estate of the victim, and the needs of his dependents.
>
> (2) Any prisoner who is directed to pay all or a fair portion of daily subsistence costs is entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposition to the assessment.
>
> (3) The department shall promulgate, within 90 days of October 1, 1978, rules which implement this section.

Chapter 33-17, Florida Administrative Code (1979), Rules of the Florida Department of Corrections, implementing Florida Statute Section 944.485 (1978), is set forth in full in the appendix.

## STATEMENT OF THE CASE

On filing the complaint, the Appellants were all prisoners within the Florida correctional system. In accordance with the challenged statute, they are required to disclose their assets and revenues as a condition of parole eligibility, and are required to pay any assessment imposed by the Florida Department of Corrections. All of the Appellants were incarcerated prior to the effective date of Section 944.485, Florida Statutes (1978), and were convicted of crimes occurring prior to that effective date. Neither an evidentiary hearing as to the propriety of any assessment nor judicial review of the administrative determination are available to any of the Appellants. The complaint was filed by the Appellants in the Leon County Circuit Court in or about June 1979. On June 18, 1979, the trial court entered judgment against the Appellants, before answers had been filed in the litigation. The trial court held the statute constitutional and valid against any constitutional attack, and specifically held that the statute did not violate the right against self-incrimination, did not deprive the Appellants of property without due process of law or deny them equal protection of the laws, and that the statute did not abridge privileges and immunities of the Appellants.

On October 30, 1980, the Florida Supreme Court rendered its opinion affirming the trial court's judgment, specifically upholding the statute as against the Appellants' attack that the statute violated the right of privacy, the right to substantive and procedural due process of law, the right against

self-incrimination, and the right to be free from ex post facto legislation. The Florida Supreme Court's decision split 4-2-1. Four justices concurred in the majority opinion; two justices concurred in the result only; and, Justice Boyd filed a dissenting opinion.

The majority opinion relied upon the case of Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980), a decision finding no right of privacy under the state constitution, to find no right of privacy was infringed by the statute. The majority found no ex post facto violation because it found the purpose of the statute was not to increase "punishment." The majority relied in part upon Fleming v. Nestor, 363 U.S. 603 (1960), for this result. The majority disposed of the Appellants' due process issue by holding that parole is neither liberty or property, within the meaning of the Fourteenth Amendment. The majority did not address whether the required assessment and payment of funds from the prisoners assets would constitute property, in the court's view. The Supreme Court addressed two other points not raised by this appeal.

The dissenting opinion expressed the opinion that the statute constituted an ex post facto law and that it deprived prisoners of liberty and property without due process of law.

## THE FEDERAL QUESTION IS SUBSTANTIAL

The question of disclosural privacy posed by this appeal is considerable, because the State of Florida has chosen to accomplish its purpose by a means calculated to be as intrusive as possible into the personal affairs of prisoners. The Florida statute requires all prisoners to disclose all assets and revenues to the state of Florida on a regular basis, or forfeit eligibility for parole. The arguable reason for such disclosure is that the information is needed to decide which prisoners can afford to pay their pro rata share of the maintenance of Florida's prison system. It is clear to any reasonable person that Florida needs disclosure only from those prisoners who elect not to pay their assessment. Just as it would make little sense to require all citizens to disclose their assets in order to determine which citizen should receive welfare payments, it makes little sense to require all prisoners to disclose their full assets in order to identify those who cannot afford to pay the assessment. While all the dimensions of the right of privacy have not been fully defined, this Court has made clear that the First, Third, Fourth, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution have carved out a zone of privacy which may not be infringed unreasonably by government. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973). Florida has intruded unreasonably upon that zone of privacy by choosing the most intrusive means of serving its arguable state ends. Because Florida unreasonably imposes disclosure upon prisoners, while using parole eligibility as a coercive

factor, Florida's scheme borders on being an unreasonable search within the meaning of the Fourth Amendment.

The Florida statute has a devastating effect upon prisoners whose crimes were committed or who were incarcerated prior to the effective date of the statute. Those persons are suddenly subjected, for the balance of their prison terms, to paying a pro rata share of the maintenance of Florida's prison system. As noted by Justice Boyd in his dissent, this monetary exaction may in some cases exceed fines permissible for the crime by state legislative act. Even assuming the most reasonable subsistence costs for a prisoner, over the period of two or three years, the Florida statute will have a devastating financial impact upon any prisoner with any assets. Already stripped by their incarceration of the ability to earn an income for themselves and their families, prisoners will be stripped entirely of any assets they may have accumulated prior to incarceration. The Florida Supreme Court held that the statute did not violate ex post facto prohibitions because the purpose of the statute was not punitive. Nevertheless, the statute vastly increases the collateral consequences of conviction and incarceration. This Court's recent decision in Weaver v. Graham, ___ U.S. ___, 49 U.S.L.W. 4155 (1981), shows the substantial character of this issue. In Weaver, this Court held that it is the "effect, not the form," which determines the ex post facto character of a statute, a distinction entirely missed by the Florida Supreme Court.

The procedural due process issues posed by this case are likewise considerable. The statute provides for the systematic taking of a prisoner's assets, his property, without providing a reasonable modicum of Fourteenth Amendment procedural due

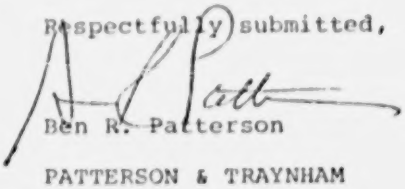
process safe guards to protect that property.

The statute directs that a prisoner shall pay all or a fair portion of his daily subsistence costs. "Daily subsistence" and "fair portion" are considerable factual issues concerning which reasonable persons will differ. Fair portion is to be determined according to the prisoners ability to pay, his liability or potential liability to victims and the needs of his dependents. These issues also have considerable factual significance. An administrative agency of the State of Florida is charged with deciding how much of the prisoner's property will be taken to satisfy the statute, and yet neither the statute nor the implementing rules provide the prisoners with either an evidentiary hearing or judicial review of the administrative determination to protect his property against arbitrary taking. The prisoner is, at most, allowed to protest the assessment in writing. The Florida Supreme Court skirted this entire issue by holding that parole was neither liberty nor property within the meaning of the Fourteenth Amendment. The unavailability of procedural safeguards to prisoners prior to the taking of their property by government violates principles as set forth in an endless number of cases decided by this Court. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Granis v. Ordean, 234 U.S. 385 (1914); Fuentes v. Shevin, 407 U.S. 67 (1972); Armstrong v. Monzo, 380 U.S. 306 (1915); Board of Regents v. Roth, 408 U.S. 564 (1972); Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

Last, there is the question of whether the statute comports with substantive due process, for it brings into play the question of whether it is both rational and civilized to

impose upon incarcerated prisoners the cost of their own incarceration. Ignoring the fact that our social system has incarcerated the prisoner and rendered him unable to earn an income, the statute assumes that the individual prisoner is the reason for the expense of a prison system being imposed upon our society at large. This is by no means sound reasoning. It can be forcefully argued that the burgeoning growth of prisons and stockades across the face of this nation has a great deal more to do with how we run our American civilization than with the inherent nature of those persons who populate the prisons. This is a matter which deserves plenary consideration.

Respectfully submitted,



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COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional statement has been served upon each of the named Appellees, Louie L. Wainwright and Paul Murchek, through their counsel the Attorney General of Florida by mailing the same by first class United States Mail to Jim Smith, Florida Attorney General, and to Lucy H. Harris, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 21st day of May 1981.

Ben R. Patterson

Sworn to and subscribed
before me this 21st
day of May, 1981.

Notary Public
My commission expires: 9/7/82

# APPENDIX

SUPREME COURT OF FLORIDA

No. 57,251

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, and JAMES RUTLEDGE, Appellants,

vs.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, FLA., PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION, Appellees.

[October 30, 1980]

ENGLAND, J.

This cause is before this Court on direct appeal from a final judgment of the circuit court upholding as facially valid section 944.485, Florida Statutes (Supp. 1978), which requires, as a condition of parole eligibility, that prisoners disclose their assets and income, and that they be assessed the cost of their subsistence in prison. The payment of subsistence costs is subject to the prisoner's ability to pay, and certain specified exemptions.*

*Section 944.485, Florida Statutes (Supp. 1978) provides:

> (1) In recognition of the fact that many prisoners in the correctional system have sources of income and assets outside of the correctional system, which may include bank accounts, inheritances, real estate, social security payments, veteran's payments, and other types of financial resources, and in recognition of the fact that the daily subsistence cost of incarcerating prisoners in the correctional system is a great burden on taxpayers of the state, each prisoner in the state correctional system, except those who have entered into an agreement under s. 947.135 prior to October 1, 1978:

Appellants raise several alleged constitutional infirmities in the subject statute, including abridgement of their right of disclosural privacy based on a decision of the First District Court of Appeal in Byron, Harless, Schaffer, Reid and Associates, Inc. v. State ex rel. Shellenberg, 360 So.2d 83 (Fla. 1st DCA 1978), violation of the prohibition on ex post facto laws, deprivation of property without procedural due process, denial of the privilege against self-incrimination, and the unlawful delegation of legislative authority.

The issue of disclosural privacy is foreclosed by our recent decision in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 Sol2d 633 (Fla. 1980), quashing the lower court's decision on which appellants rely. Similarly, the other alleged infirmities raised by appellants are devoid of merit and do not warrant extended discussion. Appellants' ex post facto argument presumes that section 944.485 operates to increase "punishment" for prisoners whose crimes were committed prior to its effective date. This presumption, however, is mistaken, as the purpose of the statute is not punitive. Flemming v. Nestor, 363 U.S. 603 (1960); Zarsky v. State, 300 So.2d 261 (Fla. 1974). Appellants' procedural due process arguments

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* (continued)

(a) Shall disclose all revenue or assets as a condition of parole eligibility.
(b) Shall pay from such income and assets, except where such income is exempt by state or federal law all or a fair portion of the prison's daily subsistence costs, based upon the inmate's ability to pay, the liability or potential liability of the inmate to the victim or the guardian or the estate of the victim, and the needs of his dependents.
(2) Any prisoner who is directed to pay all or a fair portion of daily subsistence costs is entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposition to the assessment.
(3) The department shall promulgate, within 90 days of October 1, 1978, rules which implement this section.

For the rules of the Department of Corrections regarding the financial disclosure of inmates pursuant to section 944.485, see Florida Administrative Code rule 33-17.

presume a deprivation of liberty or property, but parole is neither. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974), cert. denied, 417 U.S. 935 (1974).

Appellants' assertion that the financial disclosure requirement violates their privilege against self-incrimination is raised prematurely. The claim of privilege must ordinarily be made at the time that disclosures are sought, see Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 105-10 (1961), and it can appropriately be raised by individual inmates on their disclosure forms, see Garner v. United States, 424 U.S. 648 (1976).

Finally, appellants' unlawful delegation argument is simply not persuasive. In enacting section 944.485, the legislature has prescribed sufficient standards and guidelines to comply with article II, section 3, of the Florida Constitution. Reynolds v. State, 383 Sol2d 228 (Fla. 1980); Florida State Board of Architecture v. Wasserman, 377 So.2d 653 (Fla. 1979).

The trial court's order upholding section 944.485 in the face of appellants' constitutional challenges is affirmed.

It is so ordered.

SUNDBERG, C.J., ALDERMAN and MCDONALD, JJ., Concur
ADKINS and OVERTON, JJ., Concur in the result only
BOYD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

BOYD, J., dissenting.

I would agree with the majority opinion holding the cost assessment law constitutional if it were limited in application to prisoners sentenced for offenses committed after its effective date and if it required assessments to be imposed in court at the time of sentencing. By virtue of its retroactive effect and its procedural scheme, however, the statute as written is an unconstitutional ex post facto law and allows for the deprivation of liberty and property without due process of law.

With regard to many prisoners, the statute allows for the imposition of monetary burdens in excess of the possible punishments prescribed at the time of the offense. A law violates the ban on ex post facto legislation if it makes criminal an act after it has been committed or if it retroactively increases the possible punishment for crime. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977); Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924).

The majority opinion disposes of the ex post facto argument by summarily concluding that the increased burdens imposed by the statute do not constitute punishment, but are merely conditions imposed incident to the granting of the privilege of parole. It is common knowledge that prison sentences are authorized and imposed in contemplation of the availability of parole. Many are the concerned citizens who have inquired into the basis for a seemingly Draconian prison sentence, only to be told "Understand this: the prisoner will be eligible for parole in X years." Parole has become such a fact of life in our criminal justice system that to condition or withhold eligibility for it is to increase the burdens imposed as punishment for crime.

Even with regard to prisoners convicted of and sentenced for offenses committed after the statute's effective date, if the cost assessment is not imposed by the court at

the time of sentencing, but subsequently by prison authorities as provided by the statute, then it constitutes a deprivation of liberty or property without due process of law. The majority disposes of this problem by concluding that there is no right, in the nature of a liberty or property right, to parole. But when a prisoner is sentenced for a crime, whether it be after a trial or pursuant to a plea, the prisoner should be able to know the extent of his punishment and also be eligible for parole on an equal footing with other prisoners similarly sentenced. This statute allows administrative officials to impose additional burdens as a condition of parole eligibility. The prisoner is faced with a deprivation either of property or liberty, without due process of law.

I respectfully dissent.

An Appeal from the Circuit Court in and for Leon County,

Ben C. Willis, Judge

Ben R. Patterson and Jerry G. Traynham of Patterson and Traynham, Tallahassee, Florida,

for Appellants

Jim Smith, Attorney General, and Lucy H. Harris, Assistant Attorney General, Tallahassee, Florida,

for Appellees

IN THE SUPREME COURT OF FLORIDA

FRIDAY, FEBRUARY 20, 1981

| | | |
|---|---|---|
| EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, and JAMES RUTLEDGE, | ** | |
| Appellants, | ** | CASE NO. 57,251 |
| vs. | ** | No Circuit Court Case No. (Leon) |
| LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, FLA., PAUL MERCHECK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION, | ** | |
| Appellees. | ** | |

On consideration of the motion for rehearing filed by attorneys for appellants,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

The motion for attorney fees filed by attorneys for appellants is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By Debbie Causseaux
Deputy Clerk

C
cc: Hon. Paul F. Hartsfield, Clerk
Hon. Ben C. Willis, Chief Judge

Jerry G. Traynham, Esquire
and Ben R. Patterson, Esquire
of Patterson & Traynham
Lucy H. Harris, Esquire

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

CASE NO.

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, and JAMES RUTLEDGE,

Plaintiffs,

vs.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, FLA., PAUL MERCHECK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Defendants.

465861
RECORDED IN THE PUBLIC RECORDS OF LEON CO. FLA. IN THE BOOK & PAGE INDICATED
JUN 22 9 53 AM '79
CLERK OF THE CIRCUIT COURT

JUDGMENT

The plaintiffs named in and who signed the Complaint styled as above, which was forwarded to the Clerk of the Circuit Court of Leon County, have filed an affidavit that they cannot afford to prepay the costs of the actions they seek to file against the officers named as defendants. Nevertheless, they seek a declaratory judgment, seeking to have adjudged unconstitutional and void Chapter 78-441, Laws of Florida, Acts of 1978 Regular Session, and for injunctive relief against its enforcement. They have not complied with the requirements of Section 57.081, Florida Statutes, which requires an affidavit of insolvency to be supported by a written certificate of a member of the bar setting forth his investigation of the nature of plaintiffs' claim and that in his opinion it is meritorious and intends to act as attorney for the applicants without compensation. Such certificate is necessary to enable the filing of suit without payment of filing fees.

Although the applicants who are named as plaintiffs are not eligible to file the suit without prepayment of filing fee with the Clerk, the undersigned judge will nevertheless consider the Complaint and ascertain if it states a cause of action and render a declaration if such is appropriate without a responsive pleading from those named as defendants.

It appears somewhat contradictory that the plaintiffs assert a right to proceed in forma pauperis in their affidavit of poverty, and yet complain of violation of rights in being required, under Chapter 78-441, to disclose their revenue and assets as a condition of parole eligibility, and to pay "from such income and assets," based upon ability to pay, the liability of the inmate to the victims of their crimes and to pay a fair portion of daily subsistence costs. If they are in a state of pauperism there is no income or assets which could be affected by the operation of this law.

Furthermore, the Court finds that the statute is constitutional and valid and does not violate the plaintiffs' rights against self-incrimination, deprivation of property without due process of law, denial of equal protection of the law, abridging of privileges and immunities, or any other constitutional right. The Court finds the statute to be fully within the power of the legislature to enact in the exercise of its police powers, and such is so declared. All other relief sought by the plaintiffs is found to be without merit and is hereby denied, and, except for setting forth the declarations herein, the Complaint is dismissed.

A copy of this Judgment shall be furnished each of the parties described as plaintiffs in the above caption, and a copy of this Judgment, together with a copy of the Complaint, shall be furnished the officers named as defendants, and to the Attorney General of the State of Florida.

DONE AND ORDERED in Chambers this 18 day of June, 1979.

B. C. Willis

BEN C. WILLIS, CIRCUIT JUDGE

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, NOVEMBER 28, 1979

NOV 30 1979

EDDIE SAMUEL IVORY, ET AL.,

Appellants,

vs.

LOUIE L. WAINWRIGHT, ETC., ET AL.,

Appellees.

CASE NO. 57,251

The Court having accepted jurisdiction of the above appeal, it is

ORDERED that briefs on the merits shall be served as follows: Appellants' brief shall be served on or before December 18, 1979; Appellees' brief shall be served on or before January 7, 1980; and Appellants' reply brief shall be served on or before January 28, 1980. Please file an original and seven copies of all briefs. UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED.

IT IS FURTHER ORDERED that said case has been set for oral argument at 9:30 a.m. TUESDAY, MARCH 4, 1980, with a maximum of twenty (20) minutes to the side allowed for argument.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

Ben R. Patterson, Esquire, is hereby appointed as counsel for appellants in this cause.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

sg
cc: Louie L. Wainwright
Paul Murchek
Honorable Jim Smith
Ben R. Patterson, Esquire
Eddie Samuel Ivory

RULES

OF THE

DEPARTMENT OF CORRECTIONS

CHAPTER 33-17

FINANCIAL DISCLOSURE BY INMATES

33-17.01 Definitions. For the purposes of this Chapter:

(1) "Correctional system" includes major institutions, road prisons, vocational centers, community correctional centers and women's adjustment centers. It does not include residential facilities for persons under probation and parole supervision.

(2) "Inmates" includes inmates in major institutions, road prisons, vocational centers, community correctional centers and women's adjustment centers. It does not include persons under parole or probation status.

(3) "Assessment" as alter referred to in this rule is the amount of daily subsistence cost which an inmate is required to pay to the State of Florida.

(4) "Financial Disclosure Statement", as later referred to, is a statement of assets and/or revenue possessed by an inmate which is to be completed by each inmate in the correctional system unless otherwise excepted.

(5) "Daily Subsistence Cost" shall mean the proportionate cost of maintaining an inmate and shall include expenditures for salaries, other personal services, expenses, operating capital outlay and food products. It will not include expenditures for fixed capital outlay projects. The Department shall annually determine the average daily per diem cost for the correctional system. This determination shall be done in conjunction with the preparation of annual financial statements as of June 30 of each year. The daily subsistence cost produced

will include expenditures from general revenue sources only. The subsistence cost developed by this process will be published in annual, and monthly amounts by the Central Office and will be used as a basis for calculating assessment.

(6) "Assessment Base." The assessment base is the amount of income or assets which is available to the inmate to make payments to the State for subsistence. The assessment base will be arrived at by deducting income exempted by State or Federal law and other fixed domestic or institutional needs of the inmate from the total income available to the inmate.

Specific Authority: 20.315, 944.09, 945.21, 944.485, Florida Statutes. Law Implemented: §944.485, Florida Statutes. History: New: May 1, 1979.

33-17.02 Assessment Procedure.

(1) Financial Disclosure Statement. Each inmate in the correctional system, with the exception of those who have entered into an agreement under Section 947.135, Florida Statutes, prior to October 1, 1978, and each inmate who subsequently is incarcerated in the correctional system will file a financial disclosure statement using a format developed by the Department. The form provided by the Department will included spaces for:

a. Inmate identification.

b. A statement to be signed by the inmate acknowledging that failure to disclose revenue and/or assets which the inmate possesses is a violation of Section 944.485, Florida Statutes, for which the penalty is removal from parole eligibility.

c. Space for the inmate to disclose all income and assets which the inmate possesses along with adequate explanation of the source of the income, the type of asset, the availability of the asset for assessment and other information pertinent to the disclosure.

d. Recording the date on which the financial disclosure statement was completed and signed by the inmate.

e. Signature of the Department of Corrections representative who accepts the financial disclosure statement and the date on which the statement was accepted from the inmate.

(2) Method of Determination of Amount to be Assessed. After determining the value of the income and negotiable assets possessed by the inmate, the Department of Corrections employee responsible for completing the assessment notice to the inmate

will:

a. Determine the annual income and/or assets which will be available to the inmate.

b. Deduct from that annual amount the exclusions in paragraph 3.

c. Divide the remainder after deductions by 12 month to determine the monthly income available to the inmate.

d. Compare the monthly available income to the average monthly subsistence cost for the Department and assess the inmate for the amount, up to total monthly subsistence cost, which the inmate's available income will satisfy. An inmate will not be assessed an amount greater than the average monthly subsistence cost of the Department. The monthly amount arrived at in this process will be included in the assessment notice to the inmate. Inmates will not be required to make payments for partial months in which they are incarcerated.

(3) Income and assets to be excluded from the Assessment Base. The amount assessed each inmate will be based on that inmate's ability to pay after a thorough examination of the revenue and assets available to the inmate. Specifically excluded from consideration is income that is excepted by State or Federal law. Additionally, the following will be excluded from the assessment base:

a. Liability or potential liability for restitution payments to a victim or guardian of an estate of a victim of the inmate.

b. Needs of dependents of the inmate.

c. Amount each inmate is authorized to draw from the Inmate Trust Fund to satisfy his personal needs at

the place incarcerated.

d. Income derived from within the correctional system such as canteen operator pay.

e. Earnings received by an inmate from paid employment authorized by Chapter 33-9, Extension of the Limits of Confinement, of the Rules of the Department of Corrections. These earnings will be disbursed according to paragraph 33-9.13 of the above rules and are exempt from the assessment base.

f. Assets which are not in a negotiable form and from which no income is received by the inmate or by a third party for the inmate.

(4) Notice of Assessment.. Each inmate is entitled to a reasonable notice of the amount of the daily per diem cost which the inmate will be expected to reimburse to the State of Florida. Each business office charged with processing collections from inmates will notify the inmate at least fifteen calendar days before payment is due in the business office. Notice to the inmate will be by written letter using a standard format adopted by the Department. Acknowledgement of the notice will be completed by the inmate on the date the notice of assessment is received.

(5) Notice of Appeal. Each inmate will be given the opportunity to present reasons for opposition to the assessment. Such notice will be given in writing. The appeal must be received by the business office which originally provided the notice of assessment within fifteen calendar days after receopt of the notice of assessment.

(6) Changes to the Financial Disclosure Statement. Each inmate will immediately report any changes which affect his/her

income or assets as they were previously disclosed. Such changes will be reported by submission of a revised financial disclosure statement. That changed information will be used to revise the notice of assessment as appropriate.

(7) Exemptions, Reduced Assessments, Extended Payments. An inmate may request a review of his/her current assessment on the basis that he/she has severe, unusual or unavoidable expenses or obligations which substantially reduce his/her ability to pay the monthly subsistence assessment. The inmate must notify the Department of his/her request, and provide any receipts, tax records, bills, certified statements or other documents requested by the Department, before reconsideration of a current assessment will be undertaken. After review of the circumstances the Department may agree to an exemption, reduced assessment or an extension of payments as the circumstances warrant. A revised assessment will be transmitted to the inmate specifying the date of the revision, be it retroactive or otherwise. If a revision to the assessment is not agreed to, the inmate will be notified in writing of the decision.

(8) Implementation. The Department will designate by directive, the staff positions which are to implement and maintain the system of assessments specified in these rules. The inmates subject to these rules will be provided access to the directive to assist them in submission of disclosure statements and filing of appeals.

Specific Authority: §20.315, 944.09, 944.485, Florida Statutes. Law Implemented: §944.485, Florida Statutes. History: New: May 1, 1979.

33-17.03 Forms.

(1) Form DC No._____: To be used by inmates for filing financial disclosure statement.

INMATE FINANCIAL DISCLOSURE STATEMENT

I, _____ (Full Name), _____ (Prison No.), _____ (Social Security No.),

presently assigned to _____ (Institution),

hereby disclose possession of the following income and assets as required by Section 944.0265, Florida Statutes. I declare that the following income and assets are a complete listing and I understand that failure to disclose my total income and assets is a violation of the above-cited Florida Statute, penalty for which is removal from parole eligibility. I further declare that I will disclose any changes to this listing to the appropriate Departmental staff immediately.

Revenue:

Description:

Source:

Amount:

Frequency of Receipt (one time, monthly, yearly, etc.):

Expected Duration of Income (lump sum, 1 year, lifetime, etc.):

Assets:

Description:

Estimated Value and Source of Estimate:

Indebtedness Against the Asset and to Whom Payments are Made:

Remarks in Further Explanation of Any of the Above-Statements:

| | |
|---|---|
| _____ Signature of Declarer | _____ Date of Statement |
| _____ Signature of DC Person Receiving Statement | _____ Date Statement Received by DC |

(2) Form DC No._____: To be used by inmates for filing additional financial disclosure, if necessary.

CONTINUATION SHEET TO
INMATE FINANCIAL DISCLOSURE STATEMENT

Continuation Sheet for _____
Name of Declarer

Revenue:

Description:

Source:

Amount:

Frequency of Receipt (one time, monthly, yearly, etc):

Expected Duration of Income (lump sum, 1 year, lifetime, etc):

Assets:

Description:

Estimated Value and Source of Estimate:

Indebtedness Against the Asset and to Whom Payments are Made:

Remarks in Further Explanation of Any of the Above-Statements:

_____ _____
Signature of Declarer Date of Statement

_____ _____
Signature of DC Person Receiving Statement Date Statement Received by DC

(3) Form DC No._____: To be used by the Department to provide inmates Notice of Assessment to Pay Subsistence Cost.

NOTICE OF ASSESSMENT
TO PAY SUBSISTENCE COST

TO:_____
Inmate Name

_____
Prison Number

_____
Social Security Number

_____
Institution Name

You are hereby notified that your Financial Disclosure Statement dated _____, has been thoroughly reviewed by the designated staff of this Department. In accordance with Florida Statute 944.0265, you are hereby assessed a monthly payment of _____ to be applied to the daily subsistence cost of maintaining inmates in the correctional system. You are directed to make the necessary arrangements for payment of the above-amount to the business office in accordance with a schedule worked out with you and designated institutional staff. Should you have reasonable objections to this assessment, your appeal should be provided to the appropriate Departmental staff within fifteen calendar days from the date you receive this Notice of Assessment.

_____ _____
Signature of Person Authorizing Assessment — Date Prepared

_____ _____
Signature of Inmate Receiving Assessment — Date Received

Specific Authority: 20.315, 944.09, 945.21, 944.485, Florida Statutes. Law Implemented: §944.485, Florida Statutes.
History: New: May 1, 1979.

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, and JAMES RUTLEDGE,

Appellants,

vs. Case No. 57, 127

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS: PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

_____/

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Eddie Samuel Ivory, Charles Johnson, Edmond Duhard, Ben Chaney, Blair Smith, George Heller, Robert J. Butler, and James Rutledge, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final order of this Court affirming the trial court's declaration upholding as facially valid §944.485, Florida Statutes (Supp. 1978), and from this Court's order denying motion for rehearing in this case, dated February 20, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

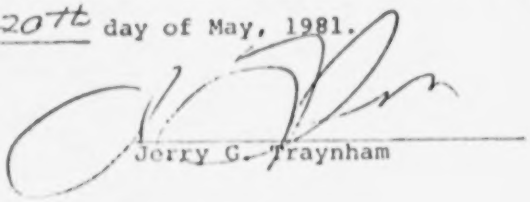
Jerry G. Traynham

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Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Jim Smith, Attorney General and Lucy H. Harris, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301, this 20th day of May, 1981.



Jerry G. Traynham

Office-Supreme Court, U.S.
FILED
JUN 23 1981
ALEXANDER L. STEVAS,
CLERK

80-6743

NO. - - - - - - - -

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHARD, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER and JAMES RUTLEDGE,

Apellants,

-vs-

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS; PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

---

On Appeal from the
Supreme Court of Florida

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# APPELLEES' MOTION TO DISMIS OR AFFIRM

---

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ATTORNEYS FOR APPELLEES

## MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the federal questions were not timely and properly raised and were not expressly passed on by the Supreme Court of Florida, that the only federal question raised does not present a substantial federal question, and that the appeal was not taken in confirmity with the Rules of the Supreme Court of the United States.

Respectfully submitted,

JIM SMITH
Attorney General

SYDNEY H. McKENZIE, III
Chief Trial Counsel
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## III. PROCEEDINGS BELOW

The plaintiffs[1] brought this action in the Circuit Court in and for Leon County, Florida, challenging Fla. Stat. §944.485 (Supp. 1978), which requires, as a condition of parole eligibility, that inmates disclose their assets and income, and that they be assessed the cost of their subsistence in prison, subject to the inmate's ability to pay and certain specified exemptions. The plaintiffs' pro se complaint stated that their challenge was based upon the United States and Florida Constitutions. Appendix to Appellees' Motion to Dismiss or Affirm, hereinafter cited as "Appellees' App.",

---

[1]For the body of this motion, the parties will be referred to by their appellation in the trial court. The appellants were the plaintiffs below, the appellees, the defendants.

at A1-A20. The Leon County Circuit Court, while not specifically mentioning either the federal or state constitutions or citing any cases construing either document, upheld the constitutionality of §944.485. Ivory v. Wainwright, (Leon County Cir. Ct. June 18, 1979), Appendix to Appellants' Jurisdictional Statement, hereinafter cited as "Appellants' App.", at 22-24.

On direct appeal to the Supreme Court of Florida, the plaintiffs were represented by counsel. In the statement of questions presented in their brief on the merits, they challenged §944.485 on the following grounds: (1) that it invades their right to privacy as protected by the First and Fourteenth Amendments to the U.S. Constitution; (2) that it is an

ex post facto law contrary to Article I, §10 of the Florida Constitution; (3) that it deprives inmates of property and liberty interests contrary to the provisions of Article I, §9, of the Florida Constitution by denying them procedural due process in the determination of certain matters; (4) that, by requiring certain disclosures, inmates are compelled to be witnesses against themselves; and (5) that it violates the Florida Constitution by granting overly broad legislative powers to an administrative agency. Appellees' App., at A21-A23.

The Florida Supreme Court held that the issue of disclosural privacy was foreclosed by its recent decision in Shevin v. Byron, Harless, Schaffer, Reid and Assoc., 379 So.2d 633 (Fla. 1980).

Ivory v. Wainwright, 393 So.2d 542, 544 (Fla. 1980) reh. den., ___ So.2d ___ (Feb. 20, 1981). Appellants' App., at 15-19. The court found no merit to plaintiffs' challenge to the statute based on the prohibition against ex post facto laws, citing Flemming v. Nestor, 363 U.S. 603 (1960) and Zarsky v. State, 300 So.2d 261 (Fla. 1974). 393 So.2d at 544. Similarly, the court, citing Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) and Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla.) cert. denied, 417 U.S. 935 (1974), dismissed the plaintiffs' procedural due process arguments. 393 So.2d at 544. The plaintiffs' two final arguments, that the statute infringes upon their privilege against self-incrimination and is an

unlawful delegation of legislative power, arguments not raised in this Court, were found wanting in merit. Id. In ruling upon the plaintiffs' challenges to §944.485, the majority did not specifically refer to either the Florida or the U.S. Constitution.

Upon denial of their motion for a rehearing, ___ So.2d ___ (Feb. 20, 1981), the plaintiffs brought this appeal. In their jurisdictional statement, the plaintiffs challenge §944.485 on the following grounds: (1) that it violates the right to privacy, (2) that it violates the ex post facto provisions of the U.S. Constitution; (3) that it deprives the plaintiffs of procedural due process, and (4) that it deprives the plaintiffs of substantive due process. The

plaintiffs profess to have raised these federal constitutional issues in the Florida Supreme Court.

## IV. ARGUMENT

### A. SUMMARY OF ARGUMENT

As can be plainly seen from reading the summary of the proceedings below, supra, the plaintiffs raised only one federal constitutional issue in the Florida Supreme Court which they raise here -- that §944.485 violates their right of privacy. All other challenges to the statute raised in this Court were either based exclusively on the Florida Constitution in the court below or, in the case of the plaintiffs' substantive due process argument, not raised at all. Furthermore, the plaintiffs' in forma pauperis petition is not in accordance

with the rules of this Court. Because this Court is without jurisdiction to hear issues not raised in the court below, because the plaintiffs' appeal is not taken in accordance with this Court's rules, and because the only federal constitutional issue raised below presents an insubstantial federal question, this appeal must be dismissed.

B. THE PLAINTIFFS' FAILURE TO PRESENT THE QUESTIONS RAISED HERE TO THE FLORIDA SUPREME COURT BARS CONSIDERATION OF THOSE ISSUES BY THIS COURT.

This Court's jurisdiction is invoked by the plaintiffs pursuant to 28 U.S.C. §1257(2), which provides for review

> [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The predecessor of this statute was very early interpreted to give this Court jurisdiction only where the federal question was both raised and decided in the state court below. Crowell v. Randell, 10 Pet. 368, 398 (1836). Thus, this Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).[2] The jurisdictional statute is satisfied only if the record shows that the question of the validity under

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[2]Cardinale was before this Court on a petition for a writ of certiorari, as were a number of other cases cited by the defendants in their argument. Because the statute giving this Court jurisdiction to review by certiorari a state decision also requires that the state statute be "drawn in question on the ground of its being repugnant to the Constitution . . . of the United States", 28 U.S.C. §1257(3), the standard for

federal law of the state statute has either been presented for decision to the highest court of the state or has in fact been decided by it. Wilson v. Cook, 327 U.S. 474, 480 (1946).

It is not enough to show that a provision of the federal constitution is applicable. Crowell v. Randall, 10 Pet. at 394. Where the highest court of a state has not specifically passed upon a federal question, it will be assumed by this Court that the omission was due to want of proper presentation in the state court. Fuller v. Oregon, 417 U.S. 40, 50 n.11 (1974); Street v. New York, 394 U.S. 576, 582 (1969). To overcome this pre-

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determining whether juridiction exists is the same. Cf., e.g., Bailey v. Anderson, 326 U.S. 203 (1945) (appeal) with Fuller v. Oregon, 417 U.S. 40 (1974) (on petition for a writ of certiorari).

sumption, the burden is on the appellant to affirmatively show that the federal constitutional question was raised and decided in the highest state court. Fuller v. Oregon, 417 U.S. at 50 n.11. If it does not appear that the federal question was raised at the proper juncture in the state court proceedings or in accordance with reasonable state rules, and that the question was not decided by the highest state court, the appeal must be dismissed for want of a properly presented federal question. Godchaux Co. v. Estopinal, 251 U.S. 179 (1919).

In determining whether the party seeking redress in this Court presented the federal issues to the highest state court, the Court will look to the record to determine what arguments were made

before the court below, and to state procedural rules mandating the form in which questions must be raised and presented to the state courts to determine if those rules were followed. Webb v. Webb, 49 U.S.L.W. 4500, 4501 & n.4 (May 18, 1981); Beck v. Washington, 369 U.S. 541, 549-54 (1962); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945).[3] A review of the plaintiffs' brief on appeal to the Florida Supreme Court and of Florida procedural rules plainly reveals that the questions raised here by the plaintiffs, save one, were not raised in the highest

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[3]A review of the state procedural rules can be construed either as an aid in deciding, as a federal matter, whether the federal constitutional question was raised below, or as an independent and adequate state ground for decision barring federal review. Webb v. Webb, 49 U.S.L.W. 4500, 4501 n.4 (May 18, 1981).

state court. Appellees' App., at A21-A60.

The plaintiffs' most obvious attempt to add a federal issue not raised below is their assertion in this Court that §944.485 violates their substantive due process rights. This issue was not even raised as a state constitutional question in the Florida Supreme Court and is nowhere argued in their brief in that court. See, Appellees' App., at A21-A60. Two of the issues the plaintiffs attempt to raise here, that the Florida statute deprives the plaintiffs of procedural due process and violates the ex post facto provisions of the United States Constitution, were raised only as challenges under the Constitution of the State of

Florida[4] in the Florida Supreme Court. See, Appellees' App., at A22-A23.

In the body of their brief, in addressing their contention that the statute in question is an ex post facto law, to which they devote one and one-half pages of argument, the only mention of the federal constitution is found in a single citation: "See, . . . Article I, §9, United States Constitution." Appellees' App., at A32. Similarly, while citing only the procedural due process guarantee of the Florida Constitution in their statement of issues, Appellees'

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[4]The plaintiffs specifically refer only to Art. I, §§9 & 10 of the Florida Constitution. Art. I, §9, provides that "[n]o person shall be deprived of life, liberty or property without due process of law, . . ." Art. I, §10, states that "[n]o . . . ex post facto law. . . shall be passed."

App., at A22-A23, the plaintiffs cite to the Fourteenth Amendment to the United States Constitution in the body of the brief, as well as to four federal cases discussing procedural due process. Appellees' App., at A36-A41.

If it were not obvious from a mere reading of the plaintiffs' brief that this presentation was insufficient to put the federal consitutional issues raised here before the Florida Supreme Court, the Florida courts' interpretations of the state constitution and state procedural rules plainly show that these issues were not properly before the state's highest court.

In interpreting the state's constitution, the state courts of Florida sometimes look to analogous federal constitu-

tional provisions and federal court cases interpreting those provisions, which the Florida courts regard as persuasive. Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc., 379 So.2d 633, 639 (Fla. 1980); Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820, 825 (1937); Houston v. State, 113 So.2d 582, 584-85 (Fla. 1st Dist.Ct.App. 1959). The same is true of federal statutes and procedural rules which are similar to state statutes and rules. Savage v. Rowell Distributing Corp., 95 So.2d 415, 417 (Fla. 1957); Bedenbaugh v. Lawrence, 141 Fla. 351, 193 So. 74, 76 (1940); Tilton v. Horton, 103 Fla. 497, 137 So. 801, 805 (1931); Booker v. Smith, 108 So.2d 790, 795 (Fla. 2nd Dist.Ct.App. 1959). Thus, in the face of the plaintiffs' omission of any federal constitu-

tional due process or ex post facto arguments from their statement of questions presented in their brief before the Florida Supreme Court, the citations to federal cases and the federal constitution should be interpreted merely as citation of persuasive authority for construction of similar state constitutional guarantees.

The Florida Supreme Court has ruled that it will decide only those issues properly presented to it. Laramore v. Laramore, 64 So.2d 662, 670 (Fla. 1953). While technical "assignments of error" are no longer required, Rule 9.040(e), Fla.R.App.P, under Rule 9.210(b)(1), Fla. R.App.P., alleged errors committed in the lower court shall be classified as "issues presented for review" in the

brief on the merits. See, Ratner v. Miami Beach First National Bank, 362 So.2d 273, 274 (Fla. 1978). Indeed, the Committee Notes to Rule 9.210, 32 Fla. Stat.Ann., following Rule 9.210, Fla. R.App.P. (Supp. 1968-80), admonish that

> [t]he abolition of assignments of error requires that counsel be vigilant in specifying for the court the errors committed, that greater attention be given the formulation of questions presented; and that counsel comply with subsection (b)(5) [of Rule 9.210] by setting forth the precise relief sought. The table of contents will contain the statement of issues presented.

An appellant before the Florida Supreme Court must clearly set out the errors complained of, and issues only "slightly argued" will be treated as abandoned. McKinnon v. Lewis, 60 Fla. 125, 53 So. 940, 941-42 (1910); see also, State v. Jensen Road and Bridge District,

144 Fla. 442, 198 So. 105, 106-07 (1940). Finally, the Florida Supreme Court has long held that even where a particular point is raised in the court below, it must be specifically raised in the state supreme court to be considered by that court on appeal. Citizens National Bank of Naples v. Indiana Ins. Co., 340 So.2d 107 (Fla. 1976); State v. Williams, 198 So.2d 21, 23 (Fla. 1967); City of Miami v. Steckoff, 111 So.2d 446 (Fla. 1959); Jones v. Neibergall, 47 So.2d 605, 606 (Fla. 1950); Florida Power Corp. v. Pinellas Utility Board, 40 So.2d 350, 358 (Fla. 1949) (en banc); Jacques v. Wellington Corp., 134 Fla. 211, 183 So. 718 (1938).

Applying these rules to the case sub judice, it is clear that the plaintiffs

did not properly raise federal substantive and procedural due process and ex post facto claims before the Florida Supreme Court. This omission is most obvious in the "Issues of Law" presented for review in the plaintiffs' brief before the Florida Supreme Court. Appellees' App., at A22-A24. Moreover, the mere fact that the plaintiffs' complaint may have presented some of these issues to the trial court does not show that they were properly before the Florida Supreme Court. See, Appellees' App., at A1-A20. Finally, even if the plaintiffs' ex post facto argument was before the state supreme court as a federal constitutional issue, it was abandoned by the "slight argument" presented on the point to that court.

C. THE FLORIDA SUPREME COURT DID NOT DECIDE THE FEDERAL CONSTITUTIONAL QUESTIONS RAISED HERE.

It is clear from the opinion below that the Florida Supreme Court did not decide, except for the right of privacy issue, the federal constitutional questions the plaintiffs attempt to raise in this Court. No substantive due process argument was even mentioned in the opinion. Ivory v. Wainwright, 393 So.2d 542 (Fla. 1980). In dismissing the plaintiffs' ex post facto claim, the state supreme court cited two cases, one a decision of this Court discussing the federal constitutional guarantee against ex post facto laws, and the other a state supreme court decision, Zarsky v. State, 300 So.2d 261 (Fla. 1974) 393 So.2d at 544. Zarsky simply cites to two other

decisions, Cross v. State, 96 Fla. 768, 119 So. 380 (1928) and Washington v. Mayo, 91 So.2d 621 (Fla. 1956). The latter case merely cites the former as authority. The Florida Supreme Court, in Cross, considered whether the statute under attack in that case was an ex post facto law under the state and federal constitutions. However, the constitutionality of the statute under the Florida Constitution is clearly considered as a separate issue by the court. Cross v. State, 119 So. at 385.

Similarly, in deciding whether the Florida statute violates the plaintiffs' procedural due process rights, the court cited one federal decision and one state decision, Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla.

1974). In Moore, the court, without citing to any specific authority, held that there was no absolute right to parole. 289 So.2d at 720. It is apparently from this statement that the court below found authority for its conclusion that there is no liberty or property interest in parole. 393 So.2d at 594.

That the state supreme court cited decisions of this Court interpreting federal constitutional guarantees does not show that the court below actually decided any federal questions. This Court, in attempting to decide whether it had jurisdiction over a particular case arising from a state court, has refused to regard as dispositive the fact that a state court cited federal constitutional cases, finding it possible that the state

court regarded the federal decisions as merely persuasive authority for interpretation of its own state constitution. Minnesota v. National Tea Co., 309 U.S. 551, 556 (1940); Levy v. Superior Court, 167 U.S. 175, 177-78 (1897). That is the most obvious reason for the federal citations here. As pointed out by the defendants, supra, Florida courts regard as persuasive authority federal court interpretations of federal constitutional provisions, federal statutes, and federal rules of procedure, when they are similar to those of Florida. Therefore, the state supreme court's citation of federal constitutional decisions can no more be regarded as a decision of a federal constitutional issue itself than can a state decision citing a federal case construing a federal procedural rule be regarded as

a decision on an issue of federal procedure.

Even assuming, arguendo, that the decision below is unclear as to its basis, decisions of this Court make clear that the Court is without jurisdiction to decide this case. As the Court has explained:

> It may be surmised, from the quotations in its opinion, that the [New York] Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment [to the U.S. Constitution], and that the affirmance by the [New York] Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise.

Lynch v. New York ex rel. Pierson, 293

U.S. 52, 54 (1934) (emphasis supplied).[5] If the grounds for decision are unclear, it is up to the appellant to affirmatively show that jurisdiction exists. Durley v. Mayo, 351 U.S. 277, 281 (1956). In their jurisdictional statement, the plaintiffs simply assert

> On October 30, 1980, the Supreme Court of Florida affirmed the trial court's judgment, expressly holding the statute non-violative of rights to privacy, not in violation of the prohibition against ex post facto laws, and that the

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[5]Of course, the defendants do not contend that the state constitution would be an adequate state ground for a decision upholding the state statute if the federal constitutional challenges had been properly presented. Cf., Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934) (state constitutional grounds were adequate and independent state grounds for decision striking down state statute as unconstitutional.) The defendants simply point to Lynch and cases like it to show that this Court will not assume jurisdiction exists; it must be clearly presented. This the plaintiffs have failed to do.

> statute did not deny Appellants liberty or property without procedural due process. With one justice dissenting, the majority of the Florida Supreme Court upheld the statute as against the constitutional challenge.

Appellants' Jurisdictional Statement, at 3. This falls far short of the mark established in Lynch and Durley. See, Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 488-492 (1965).

Finally, even if the plaintiffs can be regarded as having attempted to raise the federal constitutional issues in the state supreme court, the court could have refused, sub silentio, to decide those issues for want of proper presentation. As discussed supra, any attempt in the court below at raising the federal questions the plaintiffs have tried to

present to this Court was not in accordance with the Florida Rules of Appellate Procedure and decisions of the Florida Supreme Court, thus precluding review of these issues by the Florida Supreme Court. In Stembridge v. Georgia, 343 U.S. 541 (1952), the Georgia Supreme Court had denied, without opinion, a petition for a writ of certiorari to review a decision of the state court of appeals. The petition to the state supreme court contained a recital that the jurisdiction of that court to decide the case was based upon a violation of the petitioner's due process and equal protection rights as guaranteed by the Georgia and U.S. Constitutions. This Court, in dismissing the writ of certiorari, found it apparent that the Georgia Supreme Court took no action on

the federal constitutinal questions because those questions were not properly raised in accordance with its rule that such objections be raised in the trial court, and that the petitioner's attempt to raise these questions in general terms did not meet the state supreme court's requirements for definiteness of presentation. 343 U.S. at 547. As is true in the case sub judice, because the Georgia Supreme Court could have denied certiorari on adequate state grounds, this Court had no jurisdiction to review the state decision. Id.; see, Webb. v. Webb, 49 U.S.L.W. at 4501 n.4.

Finally, in addition to the technical requirements of 28 U.S.C. §1257, there are good policy reasons for this Court's refraining from deciding

questions not raised and decided below.

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, . . . they should be given the first opportunity to consider them.

Cardinale v. Louisiana, 394 U.S. at 439 (cit. omitted).

D. THE ONLY FEDERAL CONSTITUTIONAL QUESTION RAISED AND DECIDED BELOW IS INSUBSTANTIAL.

There is only one federal constitutional issue presented by this appeal which was raised and decided below -- the

plaintiffs' claim that Fla. Stat. §944.485 violates their right of privacy. Because that issue presents an insubstantial federal question, this appeal must be dismissed. Rule 16.1(b), Rules of the U.S. Supreme Court. Alternatively, the defendants request that the decision of the Florida Supreme Court be affirmed on the ground that the sole federal question is so unsubstantial as not to require further argument. Rule 16.1(d), Rules of the U.S. Supreme Court; see, C. Wright & A. Miller, 16 Federal Practice and Procedure §4014, at 175 n.23 (Supp. 1980).

The plaintiffs challenge §944.485 on the ground that it requires them to disclose certain financial information to the Florida Department of Corrections.

This, they claim, is in violation of their right to privacy as guaranteed by the U.S. Constitution.

This Court has recognized two, and perhaps three, zones of privacy protected by the federal constitution. The first is rooted in the fourth amendment prohibition against unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1 (1968); Weeks v. United States, 232 U.S. 383 (1914). While the plaintiffs say in their jurisdictional statement that "using parole eligibility as a coercive factor, Florida's scheme borders on being an unreasonable search within the meaning of the Fourth Amendment", Appellants' Jurisdictional Statement, at 10, the contention that the requirement that certain financial information be disclosed

constitutes an unreasonable "search" can only be described as frivolous.

Second, this Court has recognized the right of the individual to be free from government interference in making certain types of important, and very personal, decisions. This right to privacy has been strictly limited to decisions relating to intimate personal activities and relationships, such as procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-42 (1942), contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); marriage, Loving v. Virginia, 388 U.S. 1 (1967); and child rearing, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). As in Paul v. Davis,

424 U.S. 693, 713 (1976), the plaintiffs' claim that the required financial disclosure violates their privacy rights "is far afield from this line of decisions." For example, despite this Court's holding that a woman's decision as to whether to have an abortion fell within the zone of privacy protected by the federal constitution, Roe v. Wade, 410 U.S. 113 (1973), the Court has upheld record-keeping requirements for abortions over the objection that it would constitute government interference with the woman's choice. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 78-81 (1976). See also, Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979).

The third privacy interest has been described as the individual's interest in avoiding public disclosure of personal matters. Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977). However, in neither Whalen or Nixon did this Court explicitly hold that a federal constitutional right of privacy absolutely precludes government dissemination of private matters. In each case, the Court found that the information would not be disclosed to the public generally. Accordingly, no privacy interests were violated.

The plaintiffs' disclosure of limited financial information does not fall within the same category of deeply personal information under consideration

in Whalen (prescriptions for controlled substances), and in Nixon ("extremely private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files." 433 U.S. at 459.). Even assuming, arguendo, that the Court would choose to apply this third and newest privacy right to the case sub judice, here, too, access to the information which must be disclosed is limited to certain categories of persons. Both Fla. Stat. §945.10 (1979) and Rule 33-6.06, Fla. Admin. Code, prevent unrestricted access to the financial information. Appellees' App., at A70-A76. Accordingly, the plaintiffs' claims must meet

the same fate as that of the complainants in Nixon and Whalen.

Because the plaintiffs have presented an issue clearly foreclosed by previous decisions of this Court, the appeal must be dismissed for want of a substantial federal question, Rule 16.1(b), Rules of the U.S. Supreme Court, or, alternatively, summarily affirmed, Rule 16.1(d), Rules of the U.S. Supreme Court.

E. THIS APPEAL IS NOT TAKEN IN ACCORDANCE WITH THE RULES OF THE U.S. SUPREME COURT IN THAT THE APPELLANTS' IN FORMA PAUPERIS CERTIFICATE DOES NOT COMPLY WITH RULE 46, RULES OF THE U.S. SUPREME COURT.

An appeal may be dismissed if not taken in accordance with the Rules of this Court. Rule 16.1(a), Rules of the U.S. Supreme Court. The plaintiffs are

attempting to proceed in forma pauperis, yet they have failed to comply with Rule 46.1, Rules of the U.S. Supreme Court, in that their paupers' affidavit is not in the form prescribed by Form 4 of the Federal Rules of Appellate Procedure. Accordingly, their appeal should be dismissed.

## V. CONCLUSION

The questions raised on appeal here, save one, were not raised or decided in the Florida Supreme Court. The one federal constitutional issue raised and decided below is insubstantial. Finally, the appeal is not taken in accordance with the rules of this Court, in that the appellants have failed to comply with Rule 46.1, Rules of the U.S. Supreme Court.

Accordingly, the appellees respectfully request that this Court dismiss the appeal, or, alternatively, that the decision of the Florida Supreme Court be summarily affirmed.

Respectfully submitted,

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ATTORNEYS FOR APPELLEES

# APPENDIX

IN THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, JAMES RUTLEDGE,

Plaintiffs,

vs. CASE NO. _____

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, FLA., PAUL MERCHECK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Defendants.
_____/

COMPLAINT: CHALLENGING CONSTITUTIONAL VALIDITY OF CHAPTER 944.0265, FLORIDA STATUTES, 1979

This is a civil action authorized by Chapter 86 of the Florida Statutes, 1977. Plaintiffs seek Declaratory and Injunctive Relief of Rights secured under the State and Federal Constitution. The Court has jurisdiction under the article V, Sec. 5 (b) Fla. Const. and 86.011 Fla.

Stat. (1977) et. seq. For the first cause of action Plaintiffs would show:

1. All Plaintiffs herein this action is and was, at all times mentioned in this complaint, prisoners of the State of Florida in the custody of the Department of Corrections. They are presently confined at the Union Correctional Institution in Raiford, Florida.

2. Defendant Louie L. Wainwright is the Secretary of the Department of Corrections. His office is located in Tallahassee, Florida. He is responsible for the overall operations of each Correctional Institution in the State of Florida including Union Correctional Institution.

3. Defendant Paul Mercheck is the Director of the Parole and Probation Commission. His office is located in

Tallahassee, Florida. He is responsible for the overall operations of the Florida Parole and Probation Commission including the prison inmates determination for elegibility for parole.

4. Plaintiffs, as prison inmates, are within the scope and application of chapter 78-441, General Laws of Florida, also known as Provision 944.0265, Florida Statutes (1979) and Provision 944.485, Florida Statute Supplement (1978). This law will herein be referred to sometimes as the inmate subsistence cost law.

5. The inmate subsistence cost law provides in part as follows:

Section 1. Section 944.0265, Florida Statutes, is created to read: 944.0265, Department to adopt plan for subsistence fees with regard to certain prisoners: time of adoption;

requirement.--

(1) In recognition of the fact that many prisoners in the correctional system have sources of income and assets outside of the correctional system which may include bank accounts, inheritances, real estate, social security payments, veterans' payments and other types of financial resources, and in recognition of the fact that the daily subsistence cost of incarcerating prisoners in the correctional system is a great burden on the taxpayers of the state, all prisoners except those who have entered into an agreement under s. 947.135, Florida Statutes, prior to the effective date of this act; in the state correctional system:

(a) shall disclose all revenue or assets, as a condition for parole

eligibility.

(b) shall pay from such income and assets, except where such income is exempt by state or federal law, based upon the inmate's ability to pay, the liability or potential liability of the inmate to the victim or the guardian of the estate of the victim, and the need of his dependents, all or a fair portion of the prisoners' daily subsistence costs.

6. The inmate subsistence costs law imposes upon the defendants the duty, within their respective jurisdictions, to enforce same.

7. The effect of said law upon Plaintiffs is to compel them to make a financial disclosure statement listing total income and assets and for refusal Plaintiffs would automatically be deprived of their statutory right to parole

eligibility, as penalty. The inmate subsistence costs law also mandates that inmates in the Florida Prison System pay the costs for their room, board, and other upkeeps. The law, however, expressly, and otherwise, makes exclusions for some inmates from its enforcement. The defendants has taken the necessary actions as to put said law into effect upon Plaintiffs. The burden of the inmate financial disclosure law upon plaintiffs are unreasonable, arbitrary and unnecessary. Said statement could be used either as evidence or an investigatory lead against Plaintiffs in a legal prosecution, and as a penalty or forfeiture.

8. The inmate subsistence costs law bears no reasonable relationship to the health, safety and welfare, nor does it

promote general prosperity, for plaintiffs nor the general public. Such law, therefore, cannot be justified as a legitimate exercise of the police power of the State of Florida, said law claims within that it purports to benefit the taxpayers, but tends against same.

9. Plaintiffs were not properly informed about the hearings and the drafting of said law. They knew nothing, or very little, about the proceedings, which-by this law was passed. To the best of plaintiffs knowledge, no governmental authoritative source, or otherwise, came to the prisons to address the persons this law would affect on the subject. Plaintiffs communication with the general public is limited. The responsibilities of notifying Plaintiffs, as part of the public, in regards to the

preparations and presentations of preliminary hearing was not properly fulfilled. Certain due process requirements are constitutionally mandated before bills can be justifiably passed into law. Such process is lacking in the law complained of here. Even though plaintiffs are imprisoned the law affects them and they had a right to be properly notified and heard before such law was enacted on by the legislature ultimately.

10. Plaintiffs, as State Prisoners, are compelled by law to provide free labor as part of paying a debt to the state. The State legislature recently enacted laws whereas the Department of Corrections could sell their inmate free labored marketing products to the public, themselves, and other governmental agencies. This includes, but not limited

to, livestock, farm and dairy products, automobile tags, furniture, fish, poultry, etc. The revenue income from such marketing is great and ever greater because of inmate free labor. This would indicate alone that the Department of Corrections could absorb its costs for maintenance and that passing of a law compelling prison inmates to pay the costs of their upkeep while imprisoned and performing free labor towards costs is unreasonable, arbitrary and unnecessary with no benefit to the public generally.

11. It is common knowledge that the taxes collected revenues by the State of Florida has exceeded its budget costs for operations by millions and millions of dollars recently. Prison maintenance nor any other governmental body palpably

is of no unbearable financial burden to the Florida general public. Moreover, the Florida System is subsidized by Federal financial aids. There is no apparent reasonable cause to justify the legislative enactment of the law complained of here. Plaintiffs feel that this legislative action is an act of oppression against them without any benefit to the public generally and that such action has affectd their rehabilitative process. Legislative action is needed that would allow plaintiffs to be more self sufficient upon their release, not less, indeed, this would be more beneficial to the public generally. The Plaintiffs and the public would benefit from such legislation by not having to bear the burden and costs of recidivism, to say the least.

12. The demands imposed upon Plaintiffs under 944.0265, Fla.Stat. (1979), which forces Plaintiffs to bear the burden of paying the costs for their personal daily upkeep while imprisoned constitutes, in the absence of reasonable justification therefor, a confiscation of plaintiffs' property. Plaintiffs assets and finances are their own property and illegal demands which depletes said properties against plaintiffs desires is confiscation of whatever portions that may be, and cannot be justified under the State's Police Power.

13. For the reason herein before alleged the inmate subsistence costs law, section (1),(a) & (b) is unreasonable, arbitrary and capricious and deprive the plaintiffs of their property without due process of law in violation to article 1,

section 9 of the Constitution of Florida, and the 14th Amendment to the United States Constitution.

14. Unless the Court enters a judgment declaring 944.0265 Fla. Statute to be void and invalid and restrains and enjoins the defendants, as Plaintiffs herein prays, plaintiffs are either compelled or subjected to pay the costs for their personal upkeep, and make financial disclosure statements, self-incriminating, without immunity, or forfeit parole while imprisoned, extending their stay in the state prison system as penalty and plaintiff have sustained or will sustain irreparable injury thereby for which they cannot be compensated by money damages. See Plaintiffs Exhibit "A", Copy of disclosure statement form.

15. Plaintiffs have no adequate remedy at law.

AS AND FOR THE SECOND CAUSE OF ACTION

16. Plaintiffs repeat and allege the allegations and each of them, contained in paragraphs "1" through "11", and paragraphs "14" and "15", with the same force and effects as if herein set forth at length.

17. The Florida Legislature, in the enactment of chapter 78-441 section (1), (b), General Law of Florida, single out a group of Florida prisoners, of which Plaintiffs are a part, and imposed by statute upon them alone, arbitrary, unreasonable and unnecessary demands that they bear the burden of paying the costs for their personal daily keep while they are imprisoned. To Plaintiffs' knowledge, there is no other state in this

country that demands same especially where prison inmates provide free labor by law. Such discrimination is also invidious.

18. Section (1)(b) of Chapter 78-441, General Laws of Florida expressly exempts certain inmates from the burden and costs complained of herein. It appears that other inmates in the state prison system, in the group with plaintiffs, which are considered like affluent, or may become same, shall or is subject to pay the costs required by said law. The equal protection clause provides for the rich as well as the poor. The disparate treatment shown herein against plaintiffs is illegally motivated also. The inmates excluded from this law by this law are either poor and shall remain same or are excluded by same.

19. The action of the legislature, as aforesaid, in subjecting plaintiffs to the unreasonable and burdensome demands of the inmate subsistence costs law 944.0265, (1), (b), to the advantage of other inmates similarly situated, together with the classification made by it in section (1)(b), by excluding inmates that come within 947.135 Fla. Stat., and others, is discriminatory and is arbitrary and capricious and denies to plaintiffs equal protection of the laws of the state of Florida and the United States contrary to article 1 section 2 of the Constitution of the State of Florida and Fourteenth Amendment of the Constitution of the United States.

AS AND FOR A THIRD CAUSE OF ACTION

20. Plaintiffs repeat and reallege the allegations and each of them con-

tained in paragraphs "1" through "11", and paragraphs "14" through "15", with the same force and effect as if herein fully set forth at length.

21. The inmates subsistence costs laws, section (1)(a), impose upon plaintiffs, as imprisoned inmates, a compulsory demand that they either make a financial disclosure statement or forfeit their right to parole eligibility. Said law adversely affects plaintiffs right against self-incrimination, and abridges plaintiffs statutory privilege, without granting immunity, to parole eligibility, extending imprisonment as penalty without legitimate reason. The information demanded by this law is not one of normal public information and bears no reasonable benefit to the public generally through said disclosure. Without the

constitutional immunities due plaintiffs they fear that, potentially disclosure could cause them penalty, forfeiture, or prosecution on the basis of such personal disclosure as required by the law complained of herein. Such enforcement of said law cannot be justified as a legitimate exercise of police power by the State of Florida.

22. The inmate subsistence costs laws impose undue and unreasonable demands upon plaintiffs by requiring that they make a financial disclosure statement without providing immunity, which could be self-incriminating or, alternatively, forfeit their statutory privilege to parole eligibility as penalty violative of the clauses against self-incrimination afforded plaintiffs and protected by the fifth Amendment of the

United States Constitution and article 1, Section 9 of the Florida Constitution. The said law also violates the clause that protects against abridging privileges and immunities guaranteed plaintiffs by section 1 of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Plaintiffs demand a judgment of this Court:

A. Declaring that Provision 944.0265, sections (1)(a) and (1)(b), and each of them, are null and void unconstitutional and of no force and effect.

B. Permanently or Preliminarily at this juncture, enjoining defendants, their successors, and all persons acting under their direction, from enforcing or attempting to enforce the inmate subsistence cost laws of the State of

Florida, and each of them, or from advising, instituting, prosecuting or aiding in any action, suit or proceeding of any kind or character to recover from or impose upon or enforce against plaintiffs any penalty or damage for failure or refusal to obey, observe or comply with the provisions of said chapters and each of them, or from interfering with or attempting to interfere with or from advising, instituting, prosecuting or aiding in any action, suit or proceeding to interfere with, restraining or preventing plaintiffs from not paying subsistence costs and making financial disclosure statements as was before this law complained of herein was enacted.

C. Granting Plaintiffs a jury trial on all matters triable thereby.

D. Granting Plaintiffs such other and further relief as to the Court may deem just and proper, together with the costs of this action.

NOTE: The defendants and the State Attorney of Leon County shall be served with copies of the foregoing complaint as required by law.

Respectfully submitted,

s/ Eddie Samuel Ivory
EDDIE SAMUEL IVORY, et al.

s/ Eddie Samuel Ivory

s/ Robert J. Butler

s/ Charles Johnson

s/ Edmond Duhart

s/ Blair Smith

s/ George Heller

s/ Ben Chaney

s/ James Rutledge

[Verification and Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.
_____/

# BRIEF OF APPELLANTS

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[Appellants' "Table of Citations", and "Statement of the Case", and "Statement of Facts" are omitted from Appellees' Appendix. Also omitted are Appellants' "Issues of Law", which merely repeats the issues presented as they are set out in the Appellants' Table of Contents, and Appellants' "Exhibit A" to their brief.]

## I.

### A. SECTION 944.485, F.S., IN REQUIRING INMATES TO DISCLOSE THEIR ASSETS OR INCOME OR LOSE THEIR PAROLE ELIGIBILITY, IS AN INVASION OF THEIR RIGHT TO PRIVACY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 944.485, F.S., requires inmates to "disclose all revenue or assets as a condition of parole eligibility." It is the position of the Appellants that this scheme, which requires inmates to disclose their assets and income or lose their parole eligibility, is an invasion of their right to privacy. The issue of privacy is not entirely one of federal jurisprudence. The Florida Constitution, through the Declaration of Rights, contains a guarantee of the right of disclosural privacy. Section 12 of the Declaration of Rights insures people "against

the unreasonable interception of private communications by any means . . . ." This protection is not rooted in property concepts. It is based on the integrity of personhood. Markham v. Markham, 265 So.2d 59 (Fla. 1st DCA 1972), affirmed, 272 So.2d 813 (Fla. 1973).

In Byron, Harless, Schaffer, Reid & Associates, Inc. v. State, 360 So.2d 83 (Fla. 1st DCA 1978), the First District Court of Appeal stated:

> [T]he Florida Constitution expresses the theme that disclosure privacy--the personal right of some control over the broadcast of intimate information concerning the self--is an aspect of personhood which is to be protected, as are others, as fundamental.

That Court, in denying to the press certain reports on candidates for public positions, stated that to override pri-

vacy interests of constitutional dimensions, a state interest which is compelling must be present.

> When fundamental privacy interests, secured by the Due Process Clauses of the United States and Florida Constitutions, are implicated, however, it is not enough that a statute generally serves a compelling interest in the disclosure of public records. There must be a compelling state interest in the public revelation of the particular information in which the prospects [here the inmates] would otherwise enjoy privacy. To override constitutional privacy interests, a countervailing state interest must exist and be compelling at the point where those interests collide. When the public interest is not sufficiently compelling to override constitutional privacy interests in the particular information sought, an intrusive statute "must be narrowly drawn to express only the legitimate state interest at stake," or its general terms must be appropriately narrowed in judicial application.

Id. at 97. The particular statute involved here and the information demanded is a complete disclosure of financial assets and revenue as a condition of parole eligibility. Traditionally, one's revenue and financial status has been treated as a private matter, not a matter of public record. Unemployment compensation claims are filed by social security number to protect the identity of claimants. Financial information is considered confidential. Section 443.12, F.S. Similarly, income tax returns filed with the Internal Revenue Service are held to be confidential. 26 U.S.C., §7213.

Disclosure of financial information by inmates is not protected from exposure to the public through the Public Records Act. Ch. 119, F.S. It is revealed to the whole world, including fellow inmates

who may use knowledge of an inmate's financial condition to target potential victims of extortionate schemes.

Even assuming that the state has some compelling interest to force one to pay for one's incarceration, which the Appellants do not concede, disclosure of financial information at the peril of one's loss of parole eligibility is not required for that interest to be served.

A compelling state interest will override privacy interests of constitutional dimensions if the public interest cannot be met by other means less drastic or intrusive. See, Byron, Harless, supra, at 96. The task for the Court is to identify and balance the privacy interest, the public interest, and the alternatives.

Assuming for the sake of argument that the state has an interest in the inmate paying for his incarceration. Assuming for the sake of argument that the assessment fee, as determined by the agency, is appropriate. The assessment could be made on the inmate. He could pay it or refuse to pay it. What need is there of financial disclosure? If the Department is not paid, it can reduce the debt of an inmate to a judgment and seek execution on that judgment. After reducing the debt to a judgment, it can depose the inmate, Rule 1.560, Florida Rules of Civil Procedure, and determine the assets available for execution. What need is there at all for financial disclosure?

The situation of the inmate is quite different from those who have attained or are seeking public office. Financial disclosure, in the context of the public official, may only be met by a revelation of the sources of his substantial income. The compelling state interest involved with a public official is to reveal his potential conflict of interests. Such is not the situation with the inmate. It should be clear that the disclosure requirement of §944.485, F.S., is constitutionally infirm. This Court is requested to so hold.

## II.

### B. SECTION 944.485, F.S., INSOFAR AS IT IMPOSES AN ADDITIONAL PUNISHMENT OR CIRCUMSTANCE OF PUNISHMENT ON INMATES WHOSE OFFENSES PREDATED THE EFFECTIVE DATE OF THE ACT, IS AN EX POST FACTO LAW CONTRARY TO ARTICLE I, §10, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

It is the contention of Appellants that §944.485, F.S., violates the constitutional prohibition against ex post facto laws. See, Article I, §10, Constitution of the State of Florida, and Article I, §9, United States Constitution. Those inmates whose crimes predate the effective date of that section are now facing new punishments. Whatever revenue or assets they may have had before incarceration will now be stripped from them. This may include their homestead, and the thousand dollars ($1,000.00) personal property exemption

enjoyed by debtors against execution. Such may be postured as a fee, but it is, in reality, a collateral consequence of incarceration. It is a punishment.

It is well-settled that any increase in punishment, or even lessening of parole eligibility by a statute applying to a crime already committed is a violation of the prohibition against ex post facto laws. In the inmates situation, a whole new penalty has been enacted and applied retroactively, the paying of substantial subsistence costs which were not in effect at the time of the crimes. In the opinion of the Appellants, this is a fine. Even if it could be construed to be something other than a fine, it is clearly a new circumstance of punishment. See Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937);

Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68 (1925); Lee v. State, 294 So.2d 305 (Fla. 1974).

This is not a Holiday Inn where one voluntarily seeks lodging. It is not a health institution where one voluntarily seeks treatment. All those in prison are there involuntarily. The next time the judge says, "Thirty dollars or thirty days", and the convicted defendant elects to spend thirty (30) days in an institutional setting, working at hard labor, he may find the County Commission passing an ordinance imposing, after his conviction, a subsistence charge that greatly exceeds the thirty dollars ($30.00). If a rose is a rose, as Gertrude Stein once said, then this subsistence cost is a punishment. This Court is respectfully requested to declare §944.485, F.S.,

unconstitutional as an ex post facto law, insofar as it applies to those inmates whose crimes predate the effective date of the law, October 1, 1978.

## III.

### C. SECTION 944.485, F.S., DEPRIVES INMATES OF PROPERTY AND LIBERTY INTERSTS CONTRARY TO THE PROVISIONS OF ARTICLE I, §9, OF THE FLORIDA CONSTITUTION BY DENYING THEM PROCEDURAL DUE PROCESS IN THE DETERMINATION OF THE PER DIEM SUBSISTENCE COST, THEIR INDIVIDUAL ASSESSMENT, AND THEIR DENIAL OF PAROLE ELIGIBILITY.

It is the Appellants' position that the deprivation of property envisioned by this statute in regulation without any hearing and with the practical affect of taking away parole eligibility is a deprivation of property and liberty interests without due process of law. It, thus, violates the Fourteenth Amendment of the Constitution of the United States and Article I, §9, of the Constitution of the State of Florida. Before the government deprives a person of property, that person should have an opportunity to be

heard. Sniadich v. Family Finance Corporation, 395 U.S. 337, 89 S.Ct. 1820 (1968); Goldberg v. Kelly, 397 U.S. 254; Morrissey v. Brewer, 408 U.S. 471; and Fuentes v. Shevin, 407 U.S. 67.

In the context of §944.485, F.S., there is no opportunity for the inmate to be heard prior to being required to forfeit his liberty interest and the privacy of his financial situation. Furthermore, the inmate has no opportunity for a hearing to contest the determination of the Department of Corrections of the average per diem subsistence cost at fourteen dollars and sixty-four cents ($14.64). Several questions could be raised as to the determination of that subsistence cost. For example, those inmates who work on road camps perform services for the citizens of the State of Florida

which greatly exceed fourteen dollars and sixty-four cents ($14.64). Should they be charged anything? Those inmates at community correctional centers receive minimal supervision. Should they be required to pay the burden of the supervision required of those who are on death row? Should those at minimum security facilities have the same per diem subsistence cost as those in maximum security facilities? Should the young and vigorous be required to share the cost of housing and treating the aged, the ill, and the lame? Should certain services of the Department of Corrections be taxed to the incarcerated, such as research, public relations and legal? In the context of §944.485, F.S., there is no opportunity to raise those types of questions. In the determination of the ultimate per

diem subsistence cost, each inmate is denied due process.

Insofar as the determination of individual assessments, the statute provides only that an inmate shall be afforded "an opportunity to present reasons for opposition to the assessment." It would appear, from a review of the rules, that there is no opportunity to appear before any hearing officer in person. A review will only be presented in writing. Does this deny due process to the illiterate?

Vagueness inheres in the law and in the rules. While both the law and rules provide for an exclusion for "the liability or potential liability of the inmate to the victim or the guardian or the estate of the victim, and the needs of his dependents", there is no statement

in either the law or the rule developed from the law as to how the Department determines the needs, the liability, or potential liability.

The concept of due process would seemingly require, at one point or another, judicial review. The law does not provide for any review.

While separate and apart from the due process clauses, Article I, §§21 and 22 should be read here. The first, of course, provides that state courts shall be open to every person for redress of any injury. Section 944.485, F.S., does not provide any means of redress. Section 22 provides for a right of trial by jury. Where in §944.485, F.S., is there provided a right for trial by jury? Does the inmate who desires to avoid the filing of a financial disclosure form have

any right to a jury trial prior to losing his liberty interests? Does the inmate who fails to file a financial disclosure form have any right to a trial by jury before losing his parole eligibility? It would appear to be contemplated by the statute that an inmate who fails to pay his assessment would forfeit his right to parole eligibility. Is there any right to a trial by jury, or trial by court, before that right is forfeited? None would appear in the statute.

For the above-mentioned reasons, the Appellants contend that §944.485, F.S., is unconstitutional because it denies to them procedural due process.

## IV.

### D. SECTION 944.485, F.S., BY REQUIRING FINANCIAL DISCLOSURE AND CONDITIONING PAROLE ELIGIBILITY ON THE FILING OF A DISCLOSURE STATEMENT MAY BE IN VIOLATION OF INMATES' RIGHTS NOT TO BE COMPELLED TO BE WITNESSES AGAINST THEMSELVES.

It is the Appellants' position that a disclosure forced by the statute is in violation of their right to not be compelled to be witnesses against themselves, as protected by the Fifth Amendment to the United States Constitution.

If the Appellants refuse to disclose, the statute penalizes them by taking away their parole eligibility. Although it is not clear what would happen if the Appellants refused to disclose, citing the Fifth Amendment right to not incriminate oneself, a likely particular result would be to take this refusal into account in determining

future parole decisions, which are largely discretionary. The mandatory language of the statute would require the administrative body to remove parole eligibility for the failure to disclose financial information, regardless of the assertion of the Fifth Amendment right. It is well-settled that government cannot penalize a person for exercising his constitutional right not to incriminate himself. Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132 (1977); Doyle v. Ohio, 420 U.S. 610, 96 S.Ct. 2240 (1978).

Although certain governmental schemes are rightly upheld in spite of their forcing self-disclosure of potential criminal activities, California v. Byers, 402 U.S. 424, 91 S.Ct. 1535 (1971), others have been struck down,

Marchetti v. U.S., 390 U.S. 39, 88 S.Ct. 697 (1968).

In this, as in other situations concerning self-incrimination, there must be a balance sought. California v. Byers, supra; Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 76 S.Ct. 637 (1956); U.S. v. Turner, 480 F.2d 272 (6th Cir. 1973); People v. Samuel, 277 N.E. 381, 384 (N.Y. Ct. of Appeals, 1971). It is not a simple absolute matter, but, rather, depends in each case on all the circumstances, Merck & Co., Inc. v. Organic Labortories, Inc., 207 A.2d 711, 714 (N.J. 1965). The main elements to balance are the significance of the governmental interest and the likelihood of hitting upon criminal activity. U.S. v. Turner, supra. For instance, it has

been determined particularly relevant as to whether the disclosure focuses on a "highly selective group inherently suspect of criminal activities." Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79, 80 S.Ct. 194, 199, 15 L.Ed.2d 165 (1965).

The expectation of privacy has also been mentioned as a factor, U.S. v. Turner, supra, at page 277. In the instant case, the most crucial factor is that the state can make these assessments and collections, without disclosure, and, therefore, the state's interest in disclosure is not at all strong. Furthermore, unlike Internal Revenue Service documents, the reports filed here are open to the general public. Additionally, the Appellants are clearly persons who may be forced to reveal incriminating

information. They did, and do, have the expectation of privacy concerning the details of their finances. The practical effect of the scheme is to force disclosure of information that may well be incriminating, or else take away or decrease parole eligibility. There is no compelling state interest for disclosure here. The assessments can be made without financial disclosure. In this situation, the state's interest in disclosure is slim to none.

V.

E. SECTION 944.485, F.S., VIOLATES THE FLORIDA CONSTITUTION BY GRANTING OVERLY BROAD LEGISLATIVE POWERS TO AN ADMINISTRIVE AGENCY WITHOUT SUFFICIENT OR CLEAR GUIDELINES.

The branches of government are defined by Article II, § 3, of the Florida Constitution. Legislative power cannot be delegated to other agencies. The legislature must lay down clear and specific guidelines so as not to allow agencies to act with undue discretion without guidance. Harrington & Co., Inc. v. Tampa Port Authority, 358 So.2d 168 (Fla. 1978); High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977); Husband v. Cassel, 130 So.2d 69 (Fla. 1961); State v. Fowler, 114 So. 435 (Fla. 1927).

Here, the Department of Corrections is to assess either all or a fair portion

of the subsistence cost to the inmates. This is to be based on several factors (the ability to pay, liability to the victim, and the needs of dependents). Discretion is given to the Department by use of the words "fair portion". No specific guidelines are spelled out and the agency has carte blanche in deciding what is a fair portion, based on the factors mentioned. Even to this moment, there have been no specifications or further guidelines interpreting what a fair portion is. It is clear that §944.485, F.S., is unconstitutionally vague and that it delegates to the Department of Corrections the power of assessment susceptible to discriminatory exercise. Should this court uphold the Appellants' contention in this regard, it would be acting in accord with Dickinson

v. State, 227 So.2d 36 (Fla. 1969), and Drexel v. City of Miami Beach, 64 So.2d 317 (Fla. 1953), which dealt with excessive delegations of legislative authority.

In Dickinson, the court considered a challenge to a statute which delegated to the Comptroller the authority to license cemetary operators. The statute directed him to investigate the need for a cemetary in the community in which it was to be located. Section 559.39(2), F.S. (1967). This Court held that the absence of a suitable definition for two (2) critical terms, "need for a cemetary" and "need for further facilities", rendered the Comptroller's licensing authority susceptible to arbitrary application and, thus, required the invalidation of his licensing authority.

The Drexel case involved an attack upon a City ordiance by property owners where they had been denied a permit to build a parking garage. The particular ordinance provided that no garage could be constructed, except upon "approval and permit by the City Council . . . after a public hearing at which due consideration shall be given to the affect upon traffic of the proposed use . . . ." Drexel, supra, at 318. This Court found the ordinance to be invalid for lack of adequate standards to guide the exercise of administrative discretion.

Recently, in Harrington & Co., Inc., supra, this Court had reason to address the legislative authorization to Port Authorities to

> Grant such number of licenses to competent and trustworthy persons to act as stevedores in

> the port and harbor . . . as it may deem necessary, having due regard to the business of the port and harbor.

§310.28, F.S. (1973). This Court, after reviewing the statute and staying in dictum, the related enactments may be read together with a particular statute so as to cure ambiguities or omissions, said:

> [T]he fact remains that the Legislature has nowhere provided the clear and specific guidelines necessary to insure that those licensed to perform these functions are not arbitrarily selected. This delegation of undefined power by the Legislature is tantamount to an abdication of its law-making responsibility, and cannot stand in the face of Article III, §1, of the Florida Constitution.

In High Ridge Management Corp., supra, this Court emphasized the need for a statutory provision to contain objective guidelines and standards. Where are

the objective standards and guidelines in §944.485, F.S.? What factors are to be used in determining the daily subsistence cost? What factors and objective guidelines are available to determine the needs of one's dependents, or the potential liability of the inmate to his victim? Without such guidelines, §944.485, F.S., must be declared invalid as an unconstitutional delegation of legislative power.

## VI.

## CONCLUSION

There are some questions which have not been addressed here. The reason that they have not been addressed is that the facts are not clear. The statute is vague. What happens to an inmate who fails to pay his assessment? Is he kept in prison? Does he forfeit his eligibility for parole? If that is the case, there may be a violation of Article I, §11, of the Constitution of Florida whereby "no person shall be imprisoned for debt . . . ." Furthermore, without more specifics, there may be a violation of Article I, §17, which prohibits the imposition of excessive fines and cruel or unusual punishment. No facts have been developed before the Circuit Court to determine if such would be the case

in the instant situation. Nonetheless, it is clear from the aforegoing argument that §944.485, F.S., carries with it serious doubts as to its constitutionality. The Appellants will contend, based on the aforegoing arguments, that §944.485, F.S., is invalid for (a) its invasion of the privacy interests of the Appellants when alternative measures are available that are less restrictive and drastic, (b) with regard to those whose crimes predate the effective date of the Act in question as an ex post facto law, (c) as a deprivation of property and liberty interests without providing procedural due process, (d) as a violation of the Appellants' rights not to be compelled to be witnesses against themselves, (e) as a violation of the Florida Constitution, inasmuch as it amounts to an unconstitu-

tional delegation of legislative power to the Department of Corrections.

For the foregoing reasons, the Appellants respectfully request this Court to declare §944.485, F.S., invalid.

Respectfully submitted,

s/ Ben R. Patterson
Attorney for Appellants

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants hereby give notice of the following supplemental authority in connection with their claim that the act violates the ex post facto prohibitions of the state and federal constitutions: Rodriguez v. State, 380 So.2d 1123 (Fla. 2d DCA 1980) and Williams v. State, 383 So.2d 722 (Fla. 1st DCA 1980), question certified.

Respectfully submitted,

s/ Jerry G. Traynham
Counsel for Appellants

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants hereby give notice of their reliance upon the case of Joseph Vitek, etc., et al, v. Larry D. Jones, ___ U.S. ___, 48 L.W. 4317 (U.S. Supreme Court, March 25, 1980) as supplemental authority for their position in this appeal. The State of Florida had argued that a prisoner's constitutional rights are diminished by his status as a prisoner, virtually across the board. We submit that the U.S. Supreme Court's decision in the cited case establishes

unequivocably that a diminuation of civil rights to prisoners may be decided only after careful analysis and on a case by case basis. We continue to adhere to our position that a procedural protection of the Fourteenth Amendment with respect to property rights has never been held by any court to be diminished by status as a prisoner, and that the cited case establishes that the procedural protection of liberty under the Fourteenth Amendment may be diminished only in narrowly defined circumstances where that diminuation is necessary to effect the terms of imprisonment.

Respectfully submitted,

s/ Jerry G. Traynham

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Come now the Appellants, by and through the undersigned counsel, and submit their notice of reliance upon supplemental authority not cited in their brief, pursuant to Rule 9.210(g), Fla. R. App. P., as follows:

1. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978).

2. Barry v. Barchi, 47 U.S.L.W. 4812 (1979).

Respectfully submitted,
s/ Jerry G. Traynham

[Certificate of Service omitted.]

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, et al.,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, etc., et al.,

Appellees.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants hereby give notice of supplemental authority. On November 10, 1980, the United States Supreme Court decided Hughes v. Rowe, No. 79-6000, 49 U.S.L.W. 3346.

Respectfully submitted,

s/ Jerry G. Traynham

[Certificate of Service omitted].

IN THE SUPREME COURT OF FLORIDA

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHART, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER, and JAMES RUTLEDGE,

Appellants,

vs. CASE NO. 57,251

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS; PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.
_____/

MOTION FOR REHEARING

Appellants move the Court for an order granting rehearing of the substantive issues in this case, and state:

1. The Court rejected Appellants' position regarding disclosural privacy, premised entirely upon its recent decision in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379

So.2d 633 (Fla. 1980).[1] Since this Court's decision, the citizens of the State of Florida have adopted a constitutional amendment securing the right of privacy to "[e]very natural person."[2]

The statute under attack and its implementing rules are of continuing validity; if invalid, the Appellants are entitled to prospective relief. Since the people of Florida have injected into

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[1]"The issue of disclosural privacy is foreclosed by our recent decision in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980), quashing the lower court's decision on which appellants rely." Opinion, at 2.

[2]"Right of Privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access of public records and meetings as provided by law." ARTICLE I, DECLARATION OF RIGHTS, Section 23.

the Constitution that which the Court found lacking, we urge rehearing and rebriefing of the privacy issue.

On rehearing, Appellants would argue that the right of privacy has been elevated by Constitutional amendment to a fundamental right, which government may infringe, if at all, only by the least intrusive means. The statute under attack, and implementing rules, utilize the most intrusive means; certainly disclosure is necessary only by those who seek to avoid paying the costs of subsistence.

2. In dismissing Appellants' procedural due process arguments, the Court entirely misapprehended the claims of deprivation of a property interest without procedural due process. The Court disposed of the liberty interest argument

by noting there is not a protected liberty interest in parole, but apparently misapprehended that Appellants also argue parole is "property".[3]

Not so.

The property referred to by Appellants is the subsistence costs which the statute compels them to pay. The required payments are property. There is no judicial authority for limitations on the procedural protections afforded prisoners' property. Where property is taken by government, a full panoply of due process rights are required in an evidentiary hearing at some stage of the proceedings.

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[3]"Appellants' procedural due process arguments presume a deprivation of liberty or property, but parole is neither." Opinion at 2,3.

In the case of each assessment made by government, there will be disputed questions of fact regarding what are subsistence costs, a prisoner's fair share, his ability to pay, his potential liability or liability to crime victims, the needs of his dependents, the nature, interest and liquidity of his assets, and many others.

Neither the statute under attack, nor the implementing rules (of which the Court has taken judicial notice in its Opinion)[4] afford any right to Appellants or other prisoners to challenge any of the issues set forth above in an evidentiary hearing at any stage of the

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[4]See Opinion at 2, note referencing Florida Administrative Code Rule 33-17.

proceedings, or, indeed, in any meaningful fashion.[5]

3. In disposing of Appellants' arguments regarding ex post facto laws, the Court overlooked the critical distinction between requiring a prisoner to pay the cost of his own subsistence, and requiring a prisoner to pay a pro rata share of the maintenance of the entire

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[5]The situation is aggravated by the exclusions of Chapter 120. The individual decisions made by the Department of Corrections on a continuing basis with regard to how much each prisoner will be required to pay are surely decisions affecting the substantial interest of prisoners in their property, and in the taking of their property by the state, yet a due process hearing is denied. §120.52(10), Florida Statutes, provides in part:

> * * * Prisoners as defined in s944.02(5), shall not be considered parties for the purposes of obtaining proceedings under s120.54(16)or s120.57, . . .

prison system. We argue the former may be permissible under extant case law, but the latter is clearly a "fine" intended for financial support of the entire system.[6] This distinction is critical, and we believe the Court overlooked it.

4. We do not believe the Court misapprehended the balance of our arguments; their absence here is not abandonment.

Wherefore, the Appellants urge the Court to grant rehearing, and, if necessary, rebriefing, for the reasons stated above.

Respectfully submitted,
s/ Jerry G. Traynham

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[6]In fact, the statute is quite imprecise upon the distinction. A strict reading of it requires a prisoner to pay only his own subsistence costs, while the Department of Corrections in its implementing rules has opted for requiring a prisoner to pay a pro rata share of the maintenance of the entire prison system, less new capital.

[Certificate of service omitted.]

§944.485, Fla.Stat. (1979)

Department to adopt plan for subsistence fees with respect to certain prisoners; time of adoption; requirements.--

(1) In recognition of the fact that many prisoners in the correctional system have sources of income and assets outside the correctional system, which may include bank accounts, inheritances, real estate, social security payments, veteran's payments, and other types of financial resources, and in recognition of the fact that the daily subsistence cost of incarcerating prisoners in the correctional system is a great burden on the taxpayers of the state, each prisoner in the state correctional system, except those who have entered into an agreement under s.947.135 prior to October 1, 1978:

(a) Shall disclose all revenue or assets as a condition of parole eligibility.

(b) Shall pay from such income and assets, except where such income is exempt by state or federal law, all or a fair portion of the prisoner's daily subsistence costs, based upon the inmate's ability to pay, the liability or potential liability of the inmate to the victim or the guardian or the estate of the victim, and the needs of his dependents.

(2) Any prisoner who is directed to pay all or a fair portion of daily subsistence costs is entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposition to the assessment.

(3) The department shall promulgate, within 90 days of October 1, 1978, rules which implement this section.

§945.10, Fla.Stat. (1979)

Investigations; information confidential.--

(1) Except as provided below, information in a presentence investigation report made by the Department of Corrections shall be confidential and shall be available only to officers and employees of the court, the Legislature, the Parole and Probation Commission, the Department of Health and Rehabilitative Services, the Department of Corrections, and public law enforcement agencies in the performance of a public duty or, with the written permission of the Department of Corrections, to parties establishing legitimate research purposes. The Department of Corrections shall promulgate rules and regulations stating what portions of its files, reports, or

records are considered confidential and subject to restricted view. The Department of Corrections shall promulgate rules and regulations to prevent the disclosure of confidential information to unauthorized parties, except as provided above. However, nothing in this subsection shall alter other provisions of the law relating to the accessibility of inmate records.

(2) No inmate of any institution, facility, or program of the Department of Corrections shall have access to any information contained in the files of the department. The department shall restrict release of information to any person except members of the news media and those listed in subsection (1) when there is reasonable cause to believe that such person may divulge such information to

the inmate.

(3) The Department of Corrections and the commission shall mutually cooperate for the proper performance of the respective functions of each agency.

RULE 33-6.06, FLA.ADMIN.CODE (FROM CH. 33, FLA.ADMIN.CODE, "RULES OF THE DEPARTMENT OF CORRECTIONS".)

Confidential Records.

(1) No inmate of any institution, facility, or program shall have access to any information contained in the files of the Department.

(2) The following are authorized to review the records of the Department without restriction: The Governor, members of the Cabinet, officers and employees of the court, the legislature, the Parole and Probation Commission, the Department of Corrections, and public law enforcement agencies in the performance of a public duty.

(3) Members of the news media are authorized to review the records of the Department of Corrections except for information in the presentence investiga-

tion or other information deemed confidential by the Department. All confidential information shall be removed from the files of the Department prior to such review.

(4) Legitimate researchers are authorized to review the records of the Department except for information in the presentence investigation or other information deemed confidential by the Department. The latter may be reviewed with written permission from the Commission.

(5) When it is reasonably believed that any other person other than those in (2), (3) and (4) above may divulge information contained in the files of the Department to an inmate, the Department shall restrict release of any information to such person.

(6) Content of Files. Each inmate

record will contain the following documents and information which is inserted in chronological order as follows:

(a) Uniform commitment.

(b) Indictment by Grand Jury or information filed by State's Attorney.

(c) Judgment and sentence of court.

(d) Sheriff's certificate.

(e) Court order altering sentences when applicable.

(f) Photograph and identification sheet.

(g) Classification and admission summary.

(h) Presentence and post-sentence investigation.

(i) Chronologically, by date and document, of all subsequent official documents pertaining to the inmate, such as progress reports, correspondence,

investigations and other pertinent information to the individual case.

(7) All community supervision files shall be deemed confidential and are exempt from the provisions of 33-6.06(3) above. Such case files shall be available only to the members of the Florida Parole and Probation Commission, its employees and employees of the Department provided, however, that information compiled by the Department in the presentence investigation report shall be available to parties specified in Section 945.10, Florida Statutes. This confidentiality is not intended to prevent the use of the file material in management information system or to limit the dissemination of information to other criminal justice system agencies approved by the Department.

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1980

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EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHARD, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER and JAMES RUTLEDGE,

Appellants,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS: PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

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On Appeal from the Supreme Court of Florida

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# Brief in Opposition to Motion to Dismiss or Affirm

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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1980

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EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHARD, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER and JAMES RUTLEDGE,

Appellants,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS; PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

---

On Appeal from the Supreme Court of Florida

---

Brief in Opposition to Motion to Dismiss or Affirm

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I

ARGUMENT

A. SUMMARY OF ARGUMENT

As can be plainly seen from reading the summary of the proceedings below, the Plaintiffs raised the requisite substantial federal questions: first, in the pro se complaint seeking injunctive and declaratory relief from the Florida trial court; and second, on appeal to the Florida Supreme Court. Accordingly,

the Supreme Court of Florida necessarily reached its decision after considering the substantial federal questions raised by the Appellants.

B. THE APPELLANTS RAISED THEIR SUBSTANTIAL FEDERAL QUESTIONS TO THE FLORIDA SUPREME COURT, THUS INVOKING JURISDICTION OF THIS COURT TO HEAR THIS APPEAL.

This Court's jurisdiction is invoked by the Appellants Pursuant to 28 U.S.C. §1257(2). Stanton v. Stanton, 421 U.S. 7 (1975); Duren v. Missouri, 99 S. Ct. 664 (1979); Orr v. Orr, 99 S. Ct. 1102 (1979).

The Appellees contend that the Appellants asserted only that Florida Statute §944.485 was unconstitutional under the Florida Constitution as a deprivation of procedural due process and a violation of ex post facto protections. Motion of Appellee at 11-13. As support of this proposition, the Appellees cite to the Appellants' brief before the Florida Supreme Court and in doing so, ignore pertinent parts of the record below.

In support of their contention that the statute violates only the Florida Constitution prohibition against ex post facto laws, the Appellee pointed to the Appellants' brief saying, "the only mention of the Federal Constitution is in the single citation: 'See ... Article I, Section 9, United States Constitution.'" Motion of Appellee at 13. First, the Appellee ignores the proposition for which the United States Constitution is cited. Because the Appellant stated that the Florida Statute violated the "Constitutional (emphasis added) prohibition against ex post facto laws," it is clear that the Appellants' contention was not restricted to the Florida Constitution. Motion of Appellee at A32. Second, the Appellee ignores Appellants' citation to federal case law as authority that Florida Statutes §944.485 violated the

federal constitution prohibition against ex post facto laws. Motion of Appellee at A33-34. Finally, the most sinful omission in the Appellees' motion is evidenced by their failure to consider the Appellants' notice of supplemental authority. Although the Appellees included this notice in the appendix of their motion, they ignored its existence to bolster their argument. The Appellants' supplemental authority clearly states that it adds to the "claim that the act violates the ex post facto prohibitions of the state and federal constitutions." (emphasis added). Motion of Appellee at A56. Accordingly, since the Appellants' supplemental authority is part of the argument, the Appellants specifically raised the federal ex post facto question to the Florida Supreme Court.

The Appellee repeats the mistake contending that the Appellants claimed only that the statute violated the Florida Constitutional procedural due process guarantee. The Appellee said that the Appellants merely "cite [d] to the Fourteenth Amendment to the United States Constitution in the body of the brief, as well as the four federal cases discussing procedural due process." Motion of the Appellee at 14. In reality, the Appellants stated plainly that the Florida Statute "violates the Fourteenth Amendment of the Constitution of the United States (emphasis added) and Article I, Section 9, of the Constitution of the State of Florida." Motion of Appellee at A36. Additionally, the Appellees again ignored the Appellants' supplemental authority. The Appellants' supplemental authority not only cited additional federal case law but reiterated that the cases prove that the statute violates the procedural protection of the Fourteenth Amendment. Motion of Appellee A57-59.

The Appellee then contends that the Appellants' "issues of law" regarding ex post facto and due process protection referred

only to the Florida Constitution. Motion of Appellee at 10-11, 18-19. This Court has never required, however, that federal questions raised be stated specifically as "issues of law".

To the contrary, this Court instead mandates substance over form. In Green Bay & Mississippi Canal Company v. Patten Paper Company, 172 U.S. 58, 66 (1898) this Court said no particular form of words or phrases is necessary to raise the federal question; instead it is sufficient if it appears from the record that such rights were especially claimed in the state court in such manner as to bring it to the attention of that court. In Murray v. Charleston, 96 U.S. 432, 441 (1878) the Court held that its jurisdiction was not to be avoided by the mere absence of express reference to some provision of the federal constitution; that the form and mode in which the federal question was raised in the state court is of minor importance. (emphasis added). And this Court has held that the record must show "affirmatively or by fair implication (emphasis added), that some federal question was involved." Boughton v. American Exchange National Bank, 104 U.S. 427 (1881). In New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), the Court held that jurisdiction can arise if the record as a whole shows either expressly or by clear implication (emphasis added) that the federal claim was adequately presented in the state system.

Applying the law to the instant case, it is obvious that although the Appellants did not specifically allege violation of ex post facto and procedural due process federal constitutional rights in the titles of their arguments in the brief before the Florida Supreme Court, this Court has never required such specificity. Accordingly, the Appellants' clear statements in the body of their brief that Florida Statute §944.485 violated their federal constitutional guarantee against ex post facto laws or

due process violations, exceeded this Court's requirements for raising the requisite federal questions.

The Appellee also contends that the Appellants did not properly raise the federal questions to the Florida Supreme Court in accordance with Florida procedural law. Motion of Appellee at 10-11. The Appellee cites Webb v. Webb, 49 U.S.L.W. 4500, 4501 n.4 (May 18, 1981), Beck v. Washington, 326 U.S. 541, 549-54 (1962), and Bailey v. Anderson, 326 U.S. 203, 206-07 (1945), for the proposition that this Court will look to state procedural rules mandating the form in which questions must be raised and presented to state courts to determine if the federal questions were properly presented. Motion of the Appellee at 10-11. The Appellee, of course, neglected to mention the exception to that rule: the requirement that the question be raised in accordance with state practice is inapplicable where the state court actually entertained the question and decided it.

For example, in Raley v. Ohio, 360 U.S. 423, 436 (1959) this Court said: "There can be no question as to the proper presentation of the federal claim when the highest state court passes on it." See Orr v. Orr, 440 U.S. 260, 274-75 (1979); Harlin v. Missouri, 439 U.S. 459 (1979); Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (when the state supreme court decides a constitutional issue, it is properly before the United States Supreme Court even though the Appellant did not raise the issue in the state appeal.)

Accordingly, while not conceding that the Appellant did not raise the federal question in accordance with Florida Appellate rules, this Court has made it clear that compliance with state appellate rules is unnecessary when the highest state court's decision is based on the federal question.

In the case at bar, it is evident that the federal question

was necessarily involved in the decision by the Florida Supreme Court: First, the Florida Supreme Court cited both federal and state case law in their decision. Ivory v. Wainwright, 393 So.2d 542, 544 (1980). As discussed infra, pages 7-9,the citations to federal case law shows the reliance on the federal constitution, and the citations to Florida case law all track backwards to the federal case law. Second, when it appears that the Florida Supreme Court's decision was based on federal and state grounds and the state grounds are insufficient to sustain judgment, this Court has assumed jurisdiction.[1] See Johnson v. Risk, 137 U.S. 300 (1890); Abie State Bank v. Bryan, 282 U.S. 765 (1931). In Williams v. Kaiser, 323 U.S. 471, 478 (1945) citing Klinger v. Missouri (citations omitted), the court explained the rule: "[I]f the independent ground was not a substantial or sufficient one, 'it will be presumed (emphasis added) that the State court based its judgment on ... the Federal Question.'"

C. THE FLORIDA SUPREME COURT DECIDED THE FEDERAL QUESTIONS PRESENTED BY THE APPELLANT BELOW

The Appellee contends that the Florida Supreme Court's ruling in Ivory v. Wainwright, 393 So. 2d 542, (Fla. 1980) did not decide the federal questions raised by the Appellants. To support this contention, the Appellees note that the Florida Supreme Court cited both federal and state case law in discussing the Appellants' ex post facto claim. Motion of the Appellee at 20. First, the Appellee ignored the federal case cited by the Florida Supreme Court, Fleming v. Nestor, 363 U.S. 603 (1960). (Termination of an alien's social security benefits upon deportation did not violate the federal constitutional prohibition against ex post facto laws). The Appellees then argued that the Florida

1 The Appellees admit that if the federal question was raised in the Florida Supreme Court, the Florida Constitution would not be an adequate state ground for upholding Florida Statute §944.485. Motion of the Appellee at 25.

Supreme Court's citation, Zarsky v. State, 300 So.2d 261 (Fla. 1974) was proof that the Florida Supreme Court relied only on the Florida Constitution in validating Florida Statute §944.485. Motion of the Appellees at 20-21.

Tracking Zarsky backwards the Appellees admitted that Zarsky cited Cross v. State, 119 So. 380 (1928), wherein the Florida Supreme Court considered whether the statute under attack in that case was an ex post facto law under both (emphasis added) the state and federal constitutions. The Appellees then pretended that the citation of Cross within Zarsky is irrelevant because Cross decided the federal and state constitutionality of the statute separately. Motion of Appellee at 21. To the contrary, the two-step decision making in Cross, shows that not only was a federal question involved in Cross but more importantly that the Florida Supreme Court must have first passed judgment on the federal question before ruling the Florida Statute constitutional. In other words, the federal question was necessarily involved in the decision. Accordingly, the Florida Supreme Court's mention of Zarsky which in turn cites to Cross is evident that federal case law was cited for a reason: that to determine the constitutionality of Florida Statute §944.485 under the Florida Constitution, the Florida Supreme Court must have first decided the federal question raised by the Appellants'brief.

The Appellees also say that the Florida Supreme Court did not decide federal question regarding the Appellants' due process rights because the Florida Supreme Court in Ivory v. Wainwright, supra, cited both state and federal case law. Motion of Appellee at 21-22. The Appellees skipped over the federal decision, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (a reasonable entitlement to due process is not created when a state provides the possibility of parole). The

Appellees say that the Florida Supreme Court's citation of Moore v. Florida Probation and Parole Commission, 289 So.2d 719 (Fla. 1974) "without citing to any specific authority, (emphasis added) held that there was no absolute right to parole." Motion of the Appellee at 22. The Appellees ignored the specific authority that the Florida court in Moore used to reach this determination. The court said:

> While there is no absolute right to parole there is a right to proper consideration for parole. This should be free from consequences of a conviction not meeting the standards of Gideon v. Wainwright, 372 U.S. 335 (1963); Burgett v. Texas, 389 U.S. 109 (1967). The Parole Commission is required to comply with constitutional (emphasis added) requirements - it cannot deny parole upon illegal grounds or upon improper considerations.
>
> Moore v. Florida Parole and Probation Commission, 289 So.2d at 720.

Accordingly, it is evident that in citing Moore the Florida Supreme Court in Ivory decided that Florida Statute §944.485 was valid under the Florida Constitution only after first deciding that it withstood muster under the federal constitution.

The Appellees then cite Minnesota v. National Tea Company, 309 U.S. 551, 556 (1940); and Levy v. Superior Court, 167 U.S. 175, 177-78 (1897) for the proposition that this Court "has refused to regard as dispositive the fact that a state court cited federal constitutional cases." Motion of Appellee at 23.

In Minnesota, this Court refused to dismiss the appeal when "there is a strong indication, as here, that the federal constitution as judicially construed controlled the decision below." 309 U.S. at 556. As in the instant case, there is also a strong indication that the federal constitution controls the Florida court's decision; as the Appellee points out, there is no adequate state ground for upholding F.S. §944.485 if the federal constitu-

tional challenges were properly presented. Motion of the Appellee at 25.

Accordingly, as in the instant case, when it appears that the Florida Supreme Court's decision was based on federal and state grounds, and the state grounds are insufficient to sustain judgment, this Court has assumed jurisdiction. See Johnson v. Risk, 137 U.S. 300 (1890); Abie State Bank v. Bryan, 282 U.S. 765 (1931); Williams v. Kaiser, 323 U.S. 471 (1945).

The Appellee also cites Levy v. Superior Court, 167 U.S. 175, 177-78 (1897), for the same proposition; that the Florida Supreme Court cited federal case law in the instant case only as persuasive authority for interpreting the state constitution. Motion of the Appellee at 22-23. In Levy, the state statute was attacked in state court on the grounds that it violated the state constitution and not that it was repugnant to the federal constitution. In the instant case, however, the Appellants consistently argued that Florida Statute 944.485 violated the federal constitution. Accordingly, the Levy analysis is not dispositive in the case at bar.

The Appellees also cite Durley v. Mayo, 351 U.S. 277, 281 (1956) for the proposition that if the grounds for the decision by the state court are unclear, the Appellant must affirmatively show that jurisdiction exists. Motion of the Appellee at 25. But in Durley, the lack of clarity resulted from the highest state court issuing no opinion, unlike the case at bar where the Florida Supreme Court cited both state and federal cases. Accordingly, the Durley standard for clarity is inapplicable in the instant case.

D. THE FEDERAL QUESTION OF DISCLOSURAL PRIVACY IS SUBSTANTIAL

The Appellee contends the only federal constitutional question properly presented by the Appellantsis insubstantial: that Florida Statute §944.485 violates the Appellants' right of privacy. To support this contention the Appellee baldly cites Rule 16.1(b), (d), Rules of the United States Supreme Court without any supporting authority. Motion of the Appellee at 29-30.

Guidelines as to when this Court has refused jurisdiction because a state court judgment presents no substantial federal question are general. But in Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902), this Court listed two circumstances under which a federal question is considered insubstantial: First, when the federal question is "so absolutely devoid of merit (emphasis added) as to be frivolous;" or second, where the question has been "so explicitly (emphasis added) foreclosed by a decision or decisions of this Court as to leave no room for real controversy."

In Milheim v. Moffat Tunnel Improvement District, 262 U.S. 710, 716-17 (1923), this Court stated the rule for determining whether a question is frivolous. Said the Court: "[Where] [t]he federal question presented ... requires analysis and exposition for its decision, [it] is not frivolous." Because this Court has construed the federal constitution to protect certain privacy interests and Florida Statute §944.485 requires all prisoners to disclose all assets and revenues to the state of Florida on a regular basis or forfeit illegibility for parole, the federal question disclosural privacy is neither utterly without foundation nor frivolous.

As to the second standard by which this Court judges whether the federal question raised is substantial, this Court looks to whether the federal question has been "so explicitly (emphasis added) foreclosed by a decision or decisions of this

Court as to leave no room for real controversy." Equitable Life Assurance Society v. Brown, 187 U.S. at 311. See Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 290 (1952); Patterson v. Stanolind Oil and Gas Company, 305 U.S. 376 (1939).

Disclosural privacy has only been explicitly mentioned by this Court in two cases: Whalen v. Roe, 429 U.S. 589 (1977) and Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Accordingly, this interest is the newest and least defined. As recognized by the Fifth Circuit in Plante v. Gonzales, 575 F.2d 1119 (1978), this Court has provided little specific guidance on this aspect of the right of privacy and therefore neither Whalen nor Nixon resolve the question here presented. See Shevin v. Byron, Harless, Shaffer, Reid and Associates, 379 So.2d 633 (Fla. 1980). Accordingly, the federal question of disclosural privacy presented in the instant case has not been explicitly foreclosed by a decision of this Court and is therefore a substantial federal question.

The Appellees also make a substative argument in their motion before this Court; the Appellee alleges that because this Court has not held that the federal constitutional right of privacy absolutely precludes governmental dissemination of private matters, that the Appellants' privacy claim is without merit. Motion of the Appellee at 34.

To support this contention, the Appellee cites Nixon v. Administrator of General Services, 433 U.S. 425 (1977) and Whalen v. Roe, 429 U.S. 589 (1977).

In Nixon, this Court upheld the Presidential Recordings and Materials Preservation Act, 44 U.S.C.S. §2107 because of the numerous safeguards that protected the former President's constitutional right to privacy. Among the safeguards were: (1) the limited intrusion of the screening process; (2) Mr. Nixon's

status as a public figure; (3) the lack of any expectation of privacy in the overwhelming majority of the materials; (4) the important public interest in preserving the materials; (5) the Act's sensitivity to Mr. Nixon's legitimate private interests; (6) the virtual impossibility to segregating the small quantity of private materials without comprehensive screening; (7) the likelihood that regulations to be promulgated by the Administration will further moot Mr. Nixon's fears that his materials will be viewed by a number of persons.

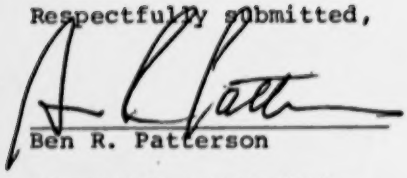
It is clear that none of the aforementioned safeguards are present in Florida Statute §944.485. For example, not only is the intrusion substantial, but the Appellants have a reasonable expectation of privacy with regard to their financial records. See Katz v. United States, 389 U.S. 347 (1967). Additionally, the Appellant is a private, not a public person, and the statute is insensitive to the Appellants' legitimate private interests. And there is no likelihood that further regulations will be promulgated to lessen the Appellants' fears that the very private financial records will not be seen by a host of persons.

In sum, Florida Statute §944.485 accomplishes its ends by a means calculated to be as intrusive as possible.

As this Court held in Roe v. Wade, 410 U.S. 113 (1973), where fundamental rights such as the right of privacy are involved, any state regulation may be justified only by a compelling state interest and must be narrowly drawn.

Accordingly, for the reasons enumerated above, Florida Statute §944.485 does not meet these standards and is therefore a deprivation of the Appellants' federal constitutional right to privacy.

Respectfully submitted,



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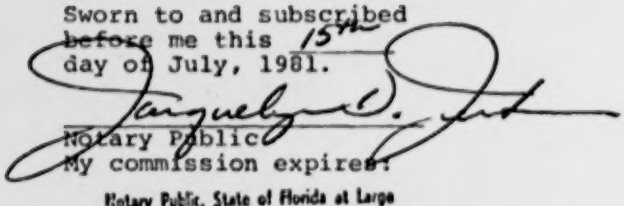
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional statement has been served upon each of the named Appellees, Louis L. Wainwright and Paul Murchek, through their counsel the Attorney General of Florida by mailing the same by first class United States mail to Jim Smith, Florida Attorney General, and to Lucy H. Harris, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 15th day of July, 1981.



Ben R. Patterson

Sworn to and subscribed
before me this 15th
day of July, 1981.



Notary Public
My commission expires:

Notary Public, State of Florida at Large
My Commission Expires Jan. 24, 1982
Bonded by American Fire & Casualty Company